2016 IL App (5th) 130295-U

NO. 5-13-0295

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Christian County.
	)	
v.	)	No. 09-CF-66
	)	
JAMAL SHEHADEH,	)	Honorable
	)	James L. Roberts,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE SCHWARM delivered the judgment of the court.
Justices Welch and Stewart concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's dismissal of the defendant's postconviction petition is affirmed where the prosecutor sought a lesser sentence than the agreed-upon cap and the defendant's claims are belied by the record.

¶ 2 Jamal Shehadeh, the defendant, appeals from the circuit court's dismissal of his postconviction petition for relief. The defendant seeks relief from his prior guilty plea because he claims that he only pleaded guilty in exchange for an agreed-upon sentence credit he never received. Because we find that the defendant does not allege the gist of a constitutional claim, we affirm.

¶ 3 BACKGROUND

¶ 4 On May 29, 2009, the State charged the defendant with two counts of unlawful delivery of a controlled substance stemming from alleged transactions on August 13, 2008, and August 27, 2008. One of these counts was a Class 1 felony, while the other count was a Class X felony due to the alleged transaction's occurring within 1,000 feet of a church. On December 8, 2009, the defendant and the State appeared before the court to enter an "open" plea agreement. The State had agreed to cap its sentencing recommendation at 14 years for both counts and to reduce the Class X felony to a Class 1 felony in exchange for the defendant's plea. The defendant told the court at the hearing that he was pleading voluntarily and that no additional promises had been made in order to obtain his plea. The court accepted the plea and set the case for sentencing.

¶ 5 On February 17, 2010, the parties appeared before the court for a sentencing hearing. The State announced a "fully negotiated" agreed sentence of 10 years on both counts, to be served concurrently, with no less than 50% served. The defendant would also serve a two-year term of mandatory supervised release and receive 267 days' credit for time served. The court explained this sentence to the defendant in detail. The court then sentenced the defendant to the agreed sentence. Prior to announcing the sentence, the court addressed how much time the defendant might actually serve after all credits had been awarded:

"THE COURT: Do you have a guesstimate of time that Mr. Shehadeh is going to serve?

[THE STATE]: In the range of–depending upon credits going into the Department of Corrections, in the range of just under four years.

THE COURT: Okay. Mr. Shehadeh, the State suggests that under the circumstances you're being presented that it's likely you would serve four years in the Department of Corrections, given credit for good time and those things; and there may be some additional good time that you can get. That's taking into consideration the time that you're getting credit for jail and home confinement. It may be more than that. It may be less than that, but most of that is to be determined by the Department of Corrections, and that's not a promise one way or the other. So, if it's been suggested to you that that's likely the time you would serve, if it ends up being more or less, that is not a basis to come in and withdraw your plea or ask to have the sentence modified if DOC calculates that differently. It's really just a guesstimate to give you a ballpark idea. Do you understand?

DEFENDANT: I do."

¶ 6 On March 16, 2010, the defendant, by counsel, filed a motion to modify and clarify the mittimus. According to the motion, the State had indicated to the defendant during sentencing negotiations that he "would serve approximately 38 months for the charges and would be given the normal credits including an initial 6 months when he reported to the Department of Corrections." This six-month credit at issue is the meritorious good-conduct credit that the Director of the Department of Corrections may award. See 730 ILCS 5/3-6-3(a)(3) (West 2010). The defendant claimed that he relied on this discussion when accepting the agreed sentence. The defendant noted that he had

since learned that the Governor had rescinded all credits other than day-for-day credit and that, therefore, the initial six-month credit was no longer available. The defendant thus asked the court to amend the mittimus to reflect day-for-day credit for presentencing time served, which "would rectify any misunderstanding between the parties and realign it with the time discussed in the plea negotiation." On June 17, 2010, the court held a hearing on this motion. During the hearing, the court admonished the defendant, noting that "[his] motion acknowledges that [he was] advised that [the Department of Corrections] does the calculation with regard to time," and that any difference between the court's "guesstimate of what time [he] would actually serve and [the Department of Corrections'] calculation *** is not a basis to withdraw [his] plea or to modify [his] sentence." The court thus denied the motion.

¶ 7 On July 22, 2010, the defendant filed a *pro se* motion to reconsider, asking the court to grant him the six-month credit that he had contemplated receiving during sentence negotiations. On September 24, 2010, the defendant's counsel filed a supplemental reply in support of the motion for reconsideration of sentencing, arguing that the court still had authority to change the defendant's sentence and that "[m]odifying the sentence to 9 years would give the parties what was bargained for in the sentencing negotiations." On October 20, 2010, the defendant filed a *pro se* motion to vacate sentence, again arguing that the parties had presumed he would receive the six-month credit that had since been suspended. On October 22, 2010, the defendant's counsel filed a similar motion, again noting "[t]hat at the time of the Settlement negotiations, all parties were under the understanding that the Defendant would obtain an additional 6 months

credit" and that the suspension of the credit "has resulted in the Defendant having to serve more time than contemplated by the Parties." Throughout the time these motions were filed, the court held several hearings regarding the six-month credit issue.

¶ 8 On March 10, 2011, the defendant filed a *pro se* motion to withdraw guilty plea and for substitution of defense counsel. According to the motion, both defense counsel and the State had told the defendant numerous times that he would receive the six-month credit. The defendant further stated that both defense counsel and the State even gave him projected sentence computations including pretrial jail credits, the six-month credit, and other possible credits. He alleged that defense counsel failed to inform him that only the Department of Corrections had authority to award such credit and that, had he known, he would not have pleaded guilty. He thus argued that the court should allow him to vacate his plea. The motion had attached to it an exhibit showing email correspondence among the defendant, defense counsel, and the State. In an email dated January 30, 2010, the State proposed the sentence offer that the defendant ultimately accepted. In that email, the State said "[i]t is my estimate that [the defendant] would serve approximately 3 years and 8 months actual time in the DOC [if he accepted the deal]." On May 13, 2011, the defendant, through counsel, filed a brief in support of his motion to withdraw guilty plea. On June 10, 2011, the defendant, through counsel, filed a supplemental brief in support of his motion to withdraw guilty plea.

¶ 9 On June 14, 2011, the circuit court held a hearing on all pending motions. During the hearing, the State noted that it had never promised the defendant a definitive sentence computation and that even the email cited by the defendant showed that the State offered

only an estimate. The court agreed with the State's interpretation of the evidence. The court also noted that the defendant had initially entered an "open" plea with the State agreeing to a cap and, therefore, the defendant had no basis to withdraw his guilty plea. Further, the court found that the transcript of the February 17, 2010, sentencing belied the defendant's allegations, stating:

> "I have pretty much a standard litany of what I go through when I do sentencing. *** I always address defendants. And when I ask the Prosecutor what amount of time do they guesstimate, and I use that term intentionally, because it is just that. It is a guess as to what time he is going to serve."

¶ 10 The court further noted that the six-month credit could be reinstated by the Governor or otherwise granted by the Department of Corrections and that, therefore, its supposed denial was not a basis to modify or to vacate the defendant's sentence. The court further noted that the defendant was "sophisticated" and "intelligent" with regards to the sentencing negotiations as shown by statements both in court and in his emails. The court thus denied all of the defendant's motions. On July 7, 2011, a fourth amended judgment and mittimus were prepared. This amended judgment and mittimus reduced the defendant's concurrent sentences to 9 years, 6 months each, and also awarded a new presentence credit of 312 days. The record contains no transcript of any proceedings regarding this amended judgment and mittimus, though the docket sheet indicates that it was an agreed-upon amended judgment. Also on July 7, 2011, the defendant received leave to file late notice of appeal. On August 8, 2011, the defendant filed notice of

appeal. On August 8, 2012, the defendant's appeal from the original conviction was dismissed on his own motion.

¶ 11 On August 6, 2012, the defendant filed a *pro se* petition for postconviction relief. In the petition, the defendant again alleged that he had pleaded guilty in reliance on statements by defense counsel and the State that he would receive the six-month credit. On March 1, 2013, the defendant filed a *pro se* amended petition for postconviction relief. In the petition, the defendant alleged that he was also told by defense counsel that he would receive work release and electronic home confinement and that these statements were, in part, a basis for his decision to plead guilty. On May 16, 2013, the circuit court entered an order dismissing the defendant's amended petition for postconviction relief, finding it to be both frivolous and patently without merit. On May 31, 2013, the defendant filed his notice of appeal from the dismissal of his amended petition for postconviction relief.

¶ 12 ANALYSIS

¶ 13 Before addressing the merits of this appeal, we must first determine whether this appeal has been rendered moot. The State has noted that the defendant has completed both his sentence and his term of mandatory supervised release. However, the defendant filed his petition for postconviction relief prior to his release from incarceration. The State therefore argues, and the defendant agrees, that the appeal is not moot. Despite the parties' agreement, we have a duty to consider jurisdiction prior to considering the merits of the appeal. See *Cangemi v. Advocate South Suburban Hospital*, 364 Ill. App. 3d 446,

453 (2006) (court has a duty to consider jurisdiction *sua sponte* even when parties fail to address jurisdiction).

¶ 14 "The existence of an actual controversy is an essential requisite to appellate jurisdiction, and courts of review will generally not decide abstract, hypothetical, or moot questions." *In re Andrea F.*, 208 Ill. 2d 148, 156 (2003). The existence of an actual controversy is so essential that this court has an independent duty to ensure that a controversy exists before considering the merits of a case. *In re Marriage of A'Hearn*, 408 Ill. App. 3d 1091, 1094 (2011). If a reviewing court cannot grant the complaining party effectual relief, the appeal is moot. *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 522-23 (2001).

¶ 15 Two First District cases are split as to whether a postconviction petition for relief filed while a defendant is incarcerated becomes moot once the defendant is released from incarceration. In *People v. Henderson*, the court interpreted the language of the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq*. (West 2012)) to apply only to a person whose liberty interests were actually being deprived. *People v. Henderson*, 2011 IL App (1st) 090923, ¶ 10. Therefore, because the defendant in that case "no longer need[ed] the Act's assistance to secure his liberty," it found the appeal moot even though the defendant filed his postconviction petition while incarcerated. *Id.* ¶ 15. In *People v. Jones*, the court noted that postconviction petitions often are severely backlogged due to understaffing and other issues, and that finding appeals moot due to such understaffing would unfairly penalize defendants. *People v. Jones*, 2012 IL App (1st) 093180, ¶ 9. Further, the court held that prior precedent justified interpreting the Act to not be

narrowly construed. *Id.* ¶¶ 10-11 (citing *People v. Davis*, 39 Ill. 2d 325 (1968)). The *Jones* court thus found that the appeal was not moot. *Id.* ¶ 10.

¶ 16 We agree with the *Jones* case in holding that postconviction petitions that are timely filed but are not heard on appeal until after the defendant's release from incarceration are not inherently moot. The Act states that "[a]ny person imprisoned in the penitentiary may institute" a postconviction proceeding; the Act never states that it requires that the person *remain* imprisoned. 725 ILCS 5/122-1(a) (West 2012). Further, because "there are obvious advantages in purging oneself of the stigma and disabilities which attend a criminal conviction," we find that the defendant's postconviction petition is not moot. *People v. Davis*, 39 Ill. 2d 325, 329 (1968).

¶ 17 The Act states that "[a]ny person imprisoned in the penitentiary may institute a proceeding under this Article if the person asserts that in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2012). Postconviction petitions not involving the death penalty progress through three distinct stages. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). "At the first stage, the circuit court must independently review the post-conviction petition *** and determine whether 'the petition is frivolous or is patently without merit.' " *People v. Edwards*, 197 Ill. 2d 239, 244 (2001) (quoting 725 ILCS 5/122-2.1(a)(2) (West 1998)). At this stage, "all well-pleaded facts that are not positively rebutted by the original trial record are to be taken as true." *People v. Coleman*, 183 Ill. 2d 366, 385 (1998). A petition is frivolous or patently without merit only if it has no arguable basis either in law

or in fact, meaning it is based on an indisputably meritless legal theory or a fanciful factual allegation. *People v. Hodges*, 234 Ill. 2d 1, 16-17 (2009). "Our review of the circuit court's dismissal of defendant's post-conviction petition is *de novo*." *Edwards*, 197 Ill. 2d at 247.

¶ 18 The defendant seeks relief from his guilty plea because, he alleges, his counsel and the State affirmatively misinformed him during sentencing negotiations that he would receive the six-month credit and because he was misled into believing he would be allowed to serve part of his sentence on work release and electronic home detention. The defendant initially pleaded guilty in what was termed an open plea agreement. In exchange, the State agreed to change the Class X felony count to a Class 1 felony and to cap its sentencing recommendation at 14 years for both counts. When a defendant pleads guilty in exchange for the State's making such concessions, "the State's ability to argue for the full range of penalties provided for in the Code of Corrections is constrained by the parameters of its agreement with the defendant." *People v. Diaz*, 192 Ill. 2d 211, 222 (2000). Further, when seeking relief from a guilty plea due to a misapprehension of fact, the defendant "bears the burden of proving that his mistaken impression was 'objectively reasonable under the circumstances existing *at the time of the plea*.' " (Emphasis in original.) *People v. Itani*, 383 Ill. App. 3d 954, 974 (2008) (quoting *People v. Spriggle*, 358 Ill. App. 3d 447, 451 (2005)).

¶ 19 The defendant pleaded guilty in open court to both counts of the indictment. In exchange, as promised, the State reduced one count from a Class X felony to a Class 1 felony. The State also agreed to cap its sentencing recommendation at 14 years for both

counts. The State in fact sought only 10 years for both counts. The defendant told the court that he understood his plea, that he was making it voluntarily, and that no additional promises had been made to him in order to cause him to plead guilty. Thus, the State fulfilled all terms of the initial guilty plea as promised. The defendant later negotiated sentencing terms with the State through his attorney. However, those terms had no bearing whatsoever on his initial guilty plea because none of those terms had been promised at the time of the plea. Because the defendant has failed to show that his expectations of receiving the six-month credit, work release, or electronic home detention were objectively reasonable at the time of the plea, he cannot use those expectations as a basis for obtaining relief from his guilty plea.

¶ 20 To the extent that the defendant could argue that he pleaded guilty only because the State and defense counsel promised him the six-month credit, we nonetheless affirm the circuit court because the record belies the defendant's claim. Nothing in the record shows an explicit promise by the court, the State, or defense counsel regarding the six-month credit. However, the defendant argues that all parties assumed he would receive the six-month credit when giving him projections on how long he would actually be incarcerated. At sentencing, the circuit court called its calculation of the time the defendant would be incarcerated as a "guesstimate." The circuit court reiterated this language at a hearing regarding the six-month credit, noting that its calculation had been merely a guess as to how long the defendant would serve. Similarly, when offering the sentence that was accepted by the defendant, the State noted that it "estimate[d]" the defendant would serve three years and eight months. Even assuming the State included

the six-month credit as part of that estimate, it is clear from the State's language that the estimate was not a guarantee. The defendant likewise cannot claim he misunderstood these statements, as the circuit court found him to be a "sophisticated" and "intelligent" defendant. Given that the same judge presided over all of the proceedings since the defendant's guilty plea and thus would have insight into the defendant's mental capacity, it appears clear from the record that the defendant was capable of understanding that the six-month credit was not guaranteed. Therefore, the record belies the defendant's claim that he relied upon receiving the six-month credit when pleading guilty.

¶ 21 Because the State constrained its sentencing recommendation to below the parameters of the initial plea agreement, the defendant could not reasonably expect to serve less time. The defendant in fact received a lighter sentence than he could reasonably have expected at the time of the initial guilty plea. Even though the defendant and the State ultimately negotiated for a shorter sentence under the presumption the defendant would receive the six-month credit, the defendant was well aware that the six-month credit was not guaranteed. Thus, we affirm the decision of the circuit court dismissing the defendant's postconviction petition.

¶ 22 CONCLUSION

¶ 23 For the reasons stated, we affirm the decision of the circuit court of Christian County.

¶ 24 Affirmed.