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2018 IL App (3d) 160257-U

Order filed July 18, 2018

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2018

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| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois, |
| Plaintiff-Appellee, |) | |
| v. |) | Appeal No. 3-16-0257 |
| |) | Circuit No. 15-CF-29 |
| JOHNNY J. MARIZETTS, |) | Honorable |
| Defendant-Appellant. |) | Albert L. Purham, Jr., Judge, Presiding. |

JUSTICE LYTTON delivered the judgment of the court.
Justices Holdridge and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* Where defendant alleged that his execution of guilty plea waiver of right to collaterally attack his conviction was the result of ineffective assistance of counsel, trial court erred in summarily dismissing his postconviction petition *sua sponte* based on waiver.

¶ 2 Defendant Johnny J. Marizetts pled guilty to first degree murder (720 ILCS 5/9-1(a)(3) (West 2006)) and was sentenced to 36 years in prison. He filed a *pro se* postconviction petition alleging that his guilty plea was involuntary and unknowing, which the trial court summarily dismissed at the first stage. On appeal, he argues that his petition should have advanced to the

second stage with counsel appointed to represent him. We reverse and remand for further proceedings.

¶ 3 In January 2015, defendant was charged with three counts of first degree murder, aggravated battery with a firearm, aggravated discharge of a firearm, unlawful possession of a weapon by a felon and attempt mob action. The indictment alleged that on March 15, 2006, defendant shot and killed Robin Underwood, knowing his act created a strong probability of death or great bodily harm, while attempting to commit a forcible felony, mob action.

¶ 4 On January 21, 2015, defendant wrote a letter to the circuit court asking that he be brought to court to face the indicted charges that he had just learned about. The trial court issued an order to have him transported to court from a federal prison in Florida. At his arraignment, defendant informed the court that he was serving a 210-month federal sentence. The court appointed public defender Thomas Sheets to defendant's case and remanded defendant to the county jail.

¶ 5 After discussing the case with defendant, Sheets filed a motion to suppress statements defendant made to investigators. Defendant also filed a *pro se* motion to suppress his statements, claiming that he had consulted with an attorney who failed to properly advise him regarding the potential consequences of those statements. Sheets adopted defendant's motion without revision.

¶ 6 Following several complaints by defendant regarding Sheets' assistance, the trial court conducted a hearing on the motions to suppress. At the beginning of the hearing, the attorneys on both sides informed the court that they were ready to proceed. Sheets then advised the court that defendant had rejected a 36-year plea offer against counsel's advice and that the offer would be rescinded if the suppression hearing proceeded. The court took a moment to explain to defendant that the first 3 charges against him carried a sentencing range of 45 years to life and

that 100% of the sentence would have to be served. The court further explained that aggravated battery had a sentencing range of 6 to 30 years with mandatory consecutive sentencing. It also reminded defendant that he was facing a minimum of 51 years in prison if the case went to trial. Defendant stated that he understood the sentencing ranges.

¶ 7 Before proceeding to the motion to suppress hearing, the court allowed defendant and counsel to have a private meeting. After a brief recess, the parties returned to the courtroom and informed the court that they had reached a fully-negotiated plea agreement in which defendant agreed to plead to first degree felony murder and that the remaining charges would be dismissed. Under the terms of the agreement, defendant accepted a sentence of 36 years in prison with 3 years' mandatory supervised release, to be served concurrently with his federal sentence.

¶ 8 After hearing the terms of the plea, the court admonished defendant regarding the charges against him, the possible sentences and his trial rights. Defendant indicated that he understood and did not have any questions. The court explained that defendant would ordinarily have the right to appeal and explained those rights. It then reminded defendant that he was waiving not only his trial rights but also his appeal rights and his right to collaterally attack the judgment. Defendant stated that he understood those rights, as well as the rights that he was relinquishing. The trial court asked if defendant still wanted to enter a plea of guilty, and defendant responded that he did. Defendant also signed a written waiver of appeal and collateral attack, stating that he waived his right to appeal and to collaterally attack his conviction and sentence.

¶ 9 The court accepted the plea and ordered that the sentence run concurrent with defendant's federal sentence. During sentencing discussions, Sheets informed the court that defendant had provided investigators with information against other gang members who were also charged with Underwood's murder and that he feared for his safety in the Illinois Department of Corrections

(IDOC) system. The court noted that any language it added to the sentencing order would be advisory but agreed to include a request that defendant be held in a facility separate from those against whom he provided information. After the court entered his sentencing order, defendant's federal sentence was reduced to 88 months. Defendant was immediately released from federal prison for time served and transferred to the IDOC.

¶ 10 Three months later, defendant filed a motion to withdraw his guilty plea, alleging that the plea was induced by threats and promises made by Sheets. The trial court denied the motion as untimely, and we dismissed the appeal for lack of jurisdiction.

¶ 11 Defendant then filed a *pro se* postconviction petition making similar allegations. He claimed that counsel was ineffective for failing to properly advise him before entering a plea of guilty. He also alleged that his guilty plea was involuntary due to "force and threats" made by Sheets. Defendant claimed that Sheets knew but did not tell him that his federal sentence would be reduced shortly after the plea from 210 months to 88 months. He asserted that based on the reduction of his federal sentence, he would be immediately released from federal custody and, had he known that would happen, he would not have pled guilty. Finally, he claimed that his plea agreement was null and void because Sheets did not properly inform him about his appeal remedies and "put [defendant] under duress to take the guilty plea."

¶ 12 The trial court summarily dismissed defendant's petition at the first stage of the postconviction proceedings, finding that it violated his agreement not to collaterally attack the conviction.

¶ 13 ANALYSIS

¶ 14 On appeal, defendant contends that his execution of a guilty plea waiver of the right to collaterally attack his conviction does not justify summary dismissal of his petition at the first stage of the postconviction proceedings.

¶ 15 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2014)) provides a remedy to a criminal defendant who claims that a substantial violation of his constitutional rights occurred in the proceedings that resulted in his conviction. *People v. Jones*, 211 Ill. 2d 140, 143 (2004). In the first stage of postconviction proceedings, the defendant files a petition and the trial court determines whether it is “frivolous or is patently without merit.” 725 ILCS 5/122-2.1(a)(2) (West 2014). To survive dismissal at this stage, the petitioner only needs to assert the gist of a constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). The gist of a constitutional claim is a low threshold. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). To reach it, defendant need not set forth the claim in its entirety and is only required to present a limited amount of detail. *Edwards*, 197 Ill. 2d at 244. Moreover, at the first stage as well as the second, the allegations in petition must be liberally construed and taken as true. *People v. Bocclair*, 202 Ill. 2d 89, 99 (2002). We use the *de novo* standard of review for the summary dismissal of a postconviction petition. *People v. Coleman*, 183 Ill. 2d 366, 387-88 (1998).

¶ 16 A defendant may waive his constitutional right to appeal as a condition of his guilty plea. *People v. McCaslin*, 2014 IL App (2d) 130571, ¶ 13. However, a defendant can still appeal his conviction and sentence if he can show that the agreement not to appeal was made unknowingly and involuntarily or suffers from some similar frailty. *People v. Alfonso*, 2016 IL App (2d) 130568, ¶ 22; *People v. Fearing*, 110 Ill. App. 3d 643, 645 (1982). This reasoning also applies to a waiver of postconviction relief after the original trial proceedings have ended. *People v. Edgeston*, 396 Ill. App. 3d 514, 522 (2009).

¶ 17 In *People v. Alfonso*, 2016 IL App (2d) 130568, the defendant waived his right to collaterally attack his conviction as a condition of his guilty plea. He filed a postconviction petition alleging that the waiver was unknowing and involuntary because his attorney coerced him into pleading guilty by providing incorrect advice and was ineffective. The trial court summarily dismissed the petition at the first stage based on the defendant's waiver. On appeal, the court reversed and remanded for second-stage proceedings, finding that the trial court erred by failing to consider the defendant's substantive assertion that the waiver was not knowing and voluntary. The appellate court noted that in the context of plea agreements, an appeal waiver may be set aside if it resulted from the ineffective assistance of trial counsel. *Alfonso*, 2016 IL App (2d) 130568, ¶¶ 38-39. The court concluded that, in such circumstances, counsel's ineffective assistance can make the plea agreement involuntary. *Id.* ¶ 39.

¶ 18 Here, defendant's petition argued that his guilty plea was unknowing and involuntary based on ineffective assistance of trial counsel. Defendant specifically stated that the plea was induced by Sheets' use of force and threats and that Sheets did not properly inform him about his appeal rights. Defendant further claimed that, had Sheets informed him that his federal sentence would be reduced and he would be immediately release from federal prison, he would not have pled guilty. Thus, under *Alfonso*, the trial court should have docketed the case for second-stage proceedings and appointed counsel. See *Alfonso*, 2016 IL App (2d) 130568, ¶ 39. The trial court erred in summarily dismissing the petition *sua sponte* on the basis that defendant waived his right to file a postconviction petition without considering the claim that the waiver was not knowing and voluntary.

¶ 19 The State's argument that our decision in *People v. Reid*, 2014 IL App (3d) 130296, requires an opposite ruling is unavailing. In *Reid*, as in this case, the defendant waived his right

to collaterally attack his conviction as part of his plea. But in dismissing the defendant's postconviction petition, the trial court did not address the defendant's waiver. The court dismissed the defendant's petition on the ground that it was frivolous and patently without merit. On appeal, the defendant argued that his claims had merit and that he should not be bound by the waiver because he was not properly admonished by the trial court. This court found that the defendant's waiver was knowing, voluntary and valid, and therefore, the defendant had no right to file a collateral petition. *Reid*, 2014 IL App (3d) 130296, ¶¶ 16-18. By contrast, defendant in this case argues that his collateral attack waiver is invalid because his plea was not knowing and intelligent as a result of ineffective assistance of counsel—an argument the defendant in *Reid* did not make. In addition, the trial court in this case dismissed the postconviction petition based on defendant's waiver, not on the merits. As we have discussed, defendant's petition should not have been summarily dismissed based on waiver without considering the knowing and voluntary nature of the plea and the waiver agreement in light of defendant's claim that counsel was ineffective. Thus, the decision in *Reid* does not apply.

¶ 20 The State also argues that summary dismissal was appropriate because defendant's petition failed to demonstrate that his plea was involuntary based on the ineffective assistance of Sheets. Specifically, the State claims that defendant's fear of retaliation was not explained in his petition and therefore cannot be used to support his contention that he would not have pled guilty had Sheets informed him that his federal prison term would be reduced. We disagree. Defendant's failure to elaborate on the reason he would not have pled guilty is not fatal to his petition at the first stage of postconviction review. See *Edwards*, 197 Ill. 2d at 244 (at first stage trial court is only concerned with legal sufficiency of the petition and whether allegations taken as true and liberally construed, fail to present the gist of a constitutional claim). The credibility

of defendant's claim that he would not have pled guilty had he known he would be immediately transferred to a state facility is not a proper basis for summary dismissal.

¶ 21

CONCLUSION

¶ 22

The judgment of the circuit court of Peoria County is reversed, and the cause is remanded for further proceedings.

¶ 23

Reversed and remanded.