2019 IL App (1st) 160915-U

No. 1-16-0915

Order filed February 7, 2019

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 17203
	)	
MARTELL BOSWELL,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Gordon and Reyes concurred in the judgment.

ORDER

¶ 1 *Held*: The summary dismissal of defendant's *pro se* postconviction petition is reversed and the cause remanded when defendant presented an arguable claim of ineffective assistance of counsel when counsel was mistaken regarding the applicable statutory minimum sentence.

¶ 2 Defendant Martell Boswell appeals from the summary dismissal of his *pro se* petition for relief filed pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). On appeal, defendant contends that the court erred when it dismissed his petition because

it had an arguable basis in law and fact. Specifically, defendant contends that he was denied the effective assistance of counsel and his right to due process when counsel, the State and the trial court executed a negotiated plea that was intended to impose the statutory minimum sentence of 21 years for aggravated vehicular hijacking while armed with a firearm, but instead imposed a 22-year sentence due to a mistake regarding the applicable statutory minimum sentence. We reverse and remand.

¶ 3 On March 7, 2013, defendant entered a plea of guilty to aggravated vehicular hijacking while armed with a firearm (720 ILCS 5/18-4(a)(4) (West 2010)), and was sentenced to 22 years in prison. At the plea hearing the State indicated that:

> "there is a firearm enhancement along with this. Count 1 is 6 to 30 with the 15—sorry, it's 7 to 30 because—thank you Angie.
>
> Aggravated vehicle hijacking, there is a little twitch in the statute. So you are looking at 7 plus the enhancement, so 22 is the base. That is our recommendation."

¶ 4 The court then admonished defendant, *inter alia*, that he was charged with a class X offense with an applicable sentencing range of 7 to 30 years in prison and that because a handgun was used, "that automatically triggers a minimum of 22 years" in prison. Defendant indicated that he understood. Defendant also indicated, knowing the nature of the charges and the possible penalties, that he wished to enter a guilty plea.

¶ 5 The State then presented the factual basis for the plea. Specifically, Jeffrey Bass would testify that on September 23, 2011, he was at a gas station when he was approached by defendant and another person, and defendant then displayed a chrome handgun and instructed him to get on the ground. Bass would further testify that he got on the ground and covered his head, that he felt

his keys being taken and that he observed his car being driven away. Nisar Hussian would also testify that he observed the incident and that the incident was recorded and that the videotape was recovered by police. The trial court found the plea to be knowing and voluntary, found a factual basis for the plea and entered judgment on the plea. Defendant was then sentenced to 22 years in prison.

¶ 6 In July 2013, defendant filed a *pro se* "Motion to Dismiss the Sentencing Range of 21 to 45 Years or the Pending Charge." The trial court noted that motion was "inappropriate" as defendant should have filed "a motion to withdraw his plea of guilty which he did not do." The court noted that the minimum was "21 on that sentence" and that defendant "pled guilty to 22 years." The court denied defendant's motion. On appeal, this court dismissed defendant's appeal as he failed to file, within 30 days, a timely postplea motion pursuant to Supreme Court Rule 604(d) (eff. Feb. 6, 2013), and granted counsel's motion to withdraw filed pursuant to *Anders v. California*, 386 U.S. 738 (1697). See *People v. Boswell,* 2014 IL App (1st) 133386-U.

¶ 7 In November 2015, defendant filed the instant *pro se* petition for postconviction relief, alleging that the trial court committed plain error when it sentenced him to the "minimum" sentence of seven years when the correct statutory minimum sentence was six years. The petition further alleged that defendant was denied the effective assistance of counsel when counsel did not object to the "wrong" sentencing range of 7 to 30 years "being imposed" on defendant and permitted an improper "minimum" sentence of 7 years to be imposed. The petition finally alleged that defendant would not have entered the guilty plea if he had been advised the 7-year "minimum sentence did not legally apply against him." The circuit court dismissed the petition as frivolous and patently without merit in a written order.

¶ 8 On appeal, defendant contends that the circuit court erred when it summarily dismissed the instant postconviction petition when it alleged that his constitutional rights were violated. Specifically, defendant contends that counsel denied him the effective assistance of counsel and the trial court violated his right to due process when the parties executed a negotiated plea that intended to impose the applicable statutory minimum sentence of 21 years in prison for his conviction for aggravated vehicular hijacking while armed with a firearm, but mistakenly imposed a 22-year sentence.

¶ 9 Before reaching the merits of defendant's claims on appeal, we address the State's claim that defendant forfeited these claims because he failed to raise them on direct appeal. The State notes that the error is apparent "on the face of the record," and that defendant knew the correct sentencing range as his *pro se* motion seeking a reduction in sentence noted that the sentencing range was "21 to 45 years." The State makes no argument regarding the merits of defendant's petition.

¶ 10 Here, the record reveals that defendant did not file a motion to withdraw his plea, rather he filed a *pro se* motion to reduce his sentence, the trial court denied him relief, and this court dismissed the subsequent appeal because defendant failed to comply with the requirements of Supreme Court Rule 604(d).

¶ 11 In those cases where the defendant's conviction was entered upon a plea of guilty, "[n]o appeal *** shall be taken unless the defendant, within 30 days of the date on which sentence is imposed, files in the trial court a motion to reconsider the sentence, if only the sentence is being challenged, or, if the plea is being challenged, a motion to withdraw the plea of guilty and vacate the judgment." See Ill. S. Ct. R. 604(d) (eff. Feb. 6, 2013). Therefore a notice of appeal filed in

the trial court without complying with Supreme Court Rule 604(d) vests the appellate court with jurisdiction over the appeal, but precludes the court from considering the merits of the appeal. *People v. Flowers*, 208 Ill 2d 291, 300-01 (2003). In those cases, unless a defendant alleges that the trial court failed to properly admonish him of his appeal rights, the appellate court must dismiss the appeal, leaving the Act as a defendant's "only recourse." *Id.* at 301.

¶ 12 Rule 604(d) also states that "[u]pon appeal any issue not raised by the defendant in the motion to reconsider the sentence or withdraw the plea of guilty and vacate the judgment shall be deemed waived." Ill. S. Ct. R. 604(d) (eff. Feb. 6, 2013). This provision has been referred to as the Rule 604(d) "waiver rule" (*People v. Stewart*, 123 Ill. 2d 368, 374 (1988)), and, thus, we will do the same here and refer to the issue as one of waiver rather than forfeiture.

¶ 13 We note that there is a split of authority as to what effect the failure to file a timely postplea motion has upon a defendant's postconviction proceedings. In *People v. Stewart*, 123 Ill. 2d 368, 373-74 (1988), the defendant filed a postconviction petition which attacked the voluntariness of his guilty plea for a reason not set forth in his motion to vacate that plea or raised on direct appeal after denial of the motion to withdraw. Our supreme court stated that under Supreme Court Rule 604(d), "issues not preserved in a motion to vacate the guilty plea are waived," and that "this waiver rule applies to post-conviction proceedings as well as to appeals." *Id.* at 374. In reaching that decision, the court noted that Supreme Court Rule 604(d) permits the introduction of extra-record facts by affidavit (see Ill. S. Ct. R. 604(d) (eff. Oct. 1, 1983)), such that the defendant's " 'off-the-record' " argument was unavailing. *Id.*

¶ 14 Relying on *Stewart*, the Second District in *People v. Vilces*, 321 Ill. App. 3d 937 (2001), held that pursuant to Supreme Court Rule 604(d), the defendant waived the issues raised in his

postconviction petition because he did not file a motion to withdraw the guilty plea. The Second District based its finding of waiver on a conclusion that "the facts that defendant needed to state his claim were entirely within his knowledge at the time a motion to withdraw the plea should have been filed." *Id.* at 941. However, the waiver rule of Supreme Court Rule 604(d) would not apply to a postconviction petition which raised a claim of involuntariness that was based on facts which were not available to a defendant at the time for filing a motion to withdraw the plea or to a claim that a defendant wished to challenge the voluntary nature of his plea but that counsel was ineffective for not filing a motion to withdraw the plea. *Id*. at 942.

¶ 15 This court reached a different conclusion in *People v. Miranda*, 329 Ill. App. 3d 837 (2002). There, the State argued that the defendant had waived review of her postconviction claims by failing to file a motion to withdraw the guilty plea in compliance with Supreme Court Rule 604(d). We found the waiver argument misplaced because the waiver rule of Supreme Court Rule 604(d) did not apply to postconviction proceedings. *Id.* at 841.

¶ 16 Following that decision, the Fourth District in *People v. Brooks*, 371 Ill. App. 3d 482, 485-86 (2007), found the Supreme Court Rule 604(d) waiver rule inapplicable in those postconviction proceedings where the defendant did not file a direct appeal of his conviction. In reaching its decision, the court cited *People v. Rose*, 43 Ill. 2d 273 (1969), where our supreme court held that while the defendant had waived, by failure to appeal, those rights based on mere error in the trial court, he was still entitled to assert those violations of constitutional rights which the Act was designed to protect and preserve. *Brooks*, 371 Ill. App. 3d at 485 (citing *Rose*, 43 Ill. 2d at 279). Thus, a party who failed to take a direct appeal was not precluded from seeking

postconviction relief on an issue of the deprivation of the defendant's constitutional rights. *Id*. at 485-86. Neither *Miranda* nor *Brooks* considered the holdings of *Stewart* and *Vilces*.

¶ 17 Because the application of the waiver rule is not an absolute bar to reviewing procedurally defaulted claims, but rather a rule of administrative convenience (*People v. Moore*, 177 Ill. 2d 421, 427 (1997)), and this district generally follows *Miranda*, the fact that defendant did not file a postplea motion pursuant to Supreme Court Rule 604(d) does not bar consideration of his claims in this postconviction proceeding.

¶ 18 The Act provides a way for defendants to challenge their convictions or sentences for violations of federal or state constitutional law. *People v. Barrow*, 195 Ill. 2d 506, 518-19 (2001). At the first stage of proceedings under the Act, a defendant files a petition, which the circuit court independently reviews and, taking the allegations as true, determines whether "the petition is frivolous or is patently without merit." (Internal quotation marks omitted.) *People v. Tate*, 2012 IL 112214, ¶ 9 (quoting *People v. Hodges*, 234 Ill. 2d 1, 10 (2009)). At this stage, the circuit court acts " 'strictly in an administrative capacity by screening out those petitions which are without legal substance or are obviously without merit.' " *Id*. (quoting *People v. Rivera*, 198 Ill. 2d 364, 373 (2001)).

¶ 19 A petition may be summarily dismissed as frivolous and patently without merit only if it has no arguable basis in law or in fact (*Tate*, 2012 IL 112214, ¶ 9), meaning that it is based on an indisputably meritless legal theory or a fanciful factual allegation (*Hodges*, 234 Ill. 2d at 16). An example of an indisputably meritless legal theory is one that is completely contradicted by the record. *Id.* Fanciful factual allegations include those that are "fantastic or delusional." *Id*. at 17. At this first stage, the petition only needs a limited amount of detail and does not need to set

forth the claim in its entirety. *People v. Harmon*, 2013 IL App (2d) 120439, ¶ 22. We review the summary dismissal of a postconviction petition *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶ 20 To state a claim for ineffective assistance of counsel, the defendant must show both that counsel's performance was objectively unreasonable and that he was prejudiced as a result of counsel's performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). In a first stage postconviction proceeding, a petition claiming ineffective assistance of counsel may not be summarily dismissed "if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *Hodges*, 234 Ill. 2d at 17.

¶ 21 Here, defendant contends that his constitutional rights were violated when his negotiated plea was "crafted" so that he would be sentenced to the applicable statutory minimum and that the parties mistakenly believed that 22 years, rather than 21, was the applicable statutory minimum. Defendant further contends that he would not have entered into the plea deal if he had known that defense counsel and the trial court were mistaken and that the seven-year statutory minimum did not actually apply to him.

¶ 22 In the case at bar, the instant petition meets the very low standard necessary to survive first stage dismissal because its claims do not lack an arguable basis in law or fact. See *Hodges*, 234 Ill. 2d at 11-12. Here, the record reflects that defendant entered a plea of guilty to aggravated vehicular hijacking while armed with a firearm. See 720 ILCS 5/18-4(a)(4) (West 2010). Aggravated vehicular hijacking while armed with a firearm is a class X felony for which a term of 15 years shall be added to the term of imprisonment imposed by the court (720 ILCS 5/18-

4(b) (West 2010)). The applicable sentencing range for a class X felony is between 6 and 30 years in prison. See 730 ILCS 5/5-4.5-25(a) (West 2010).

¶ 23 Thus, the State's statement to the trial court that the applicable sentencing range was 7 to 30 was incorrect as was its statement that "22 is the base."[1] Moreover, the trial court was mistaken when it admonished defendant that he was charged with a class X offense with an applicable sentencing range of 7 to 30 years in prison and that because a handgun was used in the commission of the offense, "that automatically trigger[ed] a minimum of 22 years" in prison. Accordingly, defendant's claim that the parties were mistaken regarding the applicable sentencing range is not a fanciful factual allegation. See *Hodges*, 234 Ill. 2d at 17.

¶ 24 It is therefore arguable that counsel's performance fell below an objective standard of reasonableness when counsel did not know the correct statutory sentencing range and failed to correct the trial court and the State's mistaken belief that the statutory minimum sentence was seven years. *Id*. Moreover, it is at least arguable that defendant was prejudiced by counsel's failure to correct the trial court and the State when the petition alleged that defendant would not have entered his plea had he been informed that the seven-year minimum did not apply to him. Accordingly, as defendant's claim that he was arguably denied the effective assistance of counsel is not positively rebutted by the record, it is neither frivolous nor patently without merit and defendant's *pro se* petition should advance for further proceedings under the Act. *Id.* at 10; 725 ILCS 5/122-2.1(b) (West 2014).

[1] We note that aggravated vehicular hijacking with a dangerous weapon other than a firearm is a class X felony (720 ILCS 18-4(a)(3) (West 2010)), for which a term of imprisonment of not less than seven years shall be imposed (720 ILCS 18-4(b) (West 2010)).

¶ 25 Defendant also contends that the trial court violated his right to due process when it relied upon the incorrect statutory minimum sentence when accepting his plea. We will not address that claim because when one claim survives summary dismissal, "all allegations of the postconviction petition advance as there is no provision in the Act for partial dismissals." *People v. Munoz*, 406 Ill. App. 3d 844, 855 (2010); see also *Rivera*, 198 Ill. 2d at 370-72 (where a petition contains an allegation that is not frivolous or patently without merit, the entire petition must be docketed for second stage proceedings). Because defendant's ineffective assistance of counsel claim is sufficient to advance his postconviction petition to the second stage, we remand for second stage proceedings on the entire petition.

¶ 26 For the foregoing reasons, the judgment of the circuit court is reversed and the cause is remanded for further proceedings consistent with this order.

¶ 27 Reversed and remanded.