2019 IL App (1st) 161033-U

No. 1-16-1033

June 26, 2019

Third 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. 12 CR 6918
	)	
ERIBERTO GIL-RAMOS,	)	Honorable
	)	James N. Karahalios,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: Circuit court did not err in summarily dismissing defendant's *pro se* postconviction petition, nor in doing so without a written order, nor did it apply a standard inappropriate to summary dismissal. Fines and fees order is corrected to reflect presentencing detention credit against fines classified as such by the trial court, but we lack jurisdiction over a charge contended to be a fine.

¶ 2 Pursuant to a 2014 negotiated guilty plea, defendant Eriberto Gil-Ramos was convicted of attempted first degree murder and unlawful use of a weapon by a felon (UUWF) and sentenced to concurrent prison terms of 20 and 7 years. He did not move to withdraw his plea or

file a direct appeal. Defendant now appeals from the summary dismissal of his 2016 *pro se* postconviction petition. He contends that his petition stated the gist of a meritorious constitutional claim that counsel rendered ineffective assistance by not investigating or presenting allegedly exculpatory evidence and by failing to inform him of any viable defenses. He also contends that the circuit court erred by not issuing a written order summarily dismissing his petition, and by applying an inappropriate standard in its dismissal. Lastly, he seeks credit against his fines for his presentencing detention. For the reasons stated below, we affirm the summary dismissal of the petition and correct the order assessing fines and fees.

¶ 3 Defendant was charged in 2012 with offenses allegedly committed on or about March 24, 2012. He was charged with three counts of attempted first degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2012)) alleging that he shot Carol Gil-Ramos (Carol) and proximately caused her great bodily harm. He was charged with aggravated battery and aggravated domestic battery for allegedly shooting Carol, with the latter charge alleging she was his wife. Lastly, he was charged with UUWF (720 ILCS 5/21-1.1(a) (West 2012)) for allegedly knowingly possessing a firearm after being convicted of felony possession of a controlled substance in case 94 CR 22149.

¶ 4 In August 2012, trial counsel told the court that he was not ready to file pretrial motions as "I'm having a lot of trouble reaching the witnesses in this case." Counsel successfully requested in September 2012 that a firearm recovered by police be tested for Carol's fingerprints, upon trial counsel's claim that he was told that the firearm did not bear defendant's fingerprints but bore "someone else's fingerprints."

¶ 5 In December 2012, trial counsel moved to withdraw, alleging that defendant identified witnesses "including family members, employer/employees, and friends" but "[n]one of the

witnesses will speak to this attorney, let alone cooperate in preparing a defense," and defendant was "unwilling or unable to help this attorney in making contact with the witnesses." Counsel alleged that defendant "has done nothing to help in the preparation of this case." Counsel also stated his "belief that he could prepare for a defense with the aid of a private investigator" but defendant could not pay for one. The court granted the motion and appointed new counsel, who we shall refer to as plea counsel to distinguish her from previous trial counsel.

¶ 6 In February 2013, plea counsel told the court that she had "not had a chance to complete my investigation." In April 2013, she told the court that she completed her investigation except for an outstanding subpoena of "certain" jail records, stating that she had "spoken to what witnesses are available."

¶ 7 A plea conference commenced in May 2013 after the court gave defendant the requisite admonishments. See Ill. S. Ct. R. 402(d) (eff. July 1, 2012). Defendant told the court that he understood the admonishments and wanted a conference. The conference was continued in June and July. Plea counsel sought both continuances, and defendant personally agreed to the latter continuance.

¶ 8 Plea counsel filed a motion to suppress statements in December 2013, alleging that defendant gave statements following his March 2012 arrest after his attorney appeared at the police station but was not allowed to meet with defendant. Hearing on the motion was continued multiple times because the attorney would be defendant's sole witness and had told plea counsel "she would be available to testify" but plea counsel was "having difficulty getting her schedule."

¶ 9 However, on February 19, 2014, plea counsel asked for another plea conference. The court again admonished defendant, who confirmed that he understood the admonishments and

agreed to the conference. After the conference, plea counsel obtained a continuance so defendant could confer with his family regarding the "substantial" prison term from the conference. The motion to suppress statements was withdrawn, with defendant's personal agreement in court.

¶ 10 On February 21, 2014, the State and plea counsel told the court that the plea agreement was for (1) the State to amend the indictment so that attempted first degree murder was committed by striking Carol with a bludgeon, (2) defendant to plead guilty to the amended attempted murder charge and UUWF and receive concurrent prison terms of 20 and 7 years, with three years of mandatory supervised release and with fines and fees, and (3) the State to nol-pros all other charges. Defendant confirmed that he understood the agreement to be as stated. Plea counsel waived reswearing or re-execution of the charging instrument, and the State amended the attempted murder charge to allege that defendant struck Carol while armed with a bludgeon.

¶ 11 The court admonished defendant of the offenses to which he was pleading and the applicable sentencing ranges. It admonished him that he was waiving his right to a jury trial, and he signed a jury waiver. It admonished him that he was waiving his right to a trial, including cross-examining witnesses and presenting a defense. He agreed that nobody forced or threatened him to plead guilty, nor made any promises beyond the plea agreement, and that he was not under the influence of drugs or alcohol.

¶ 12 The parties, including defendant personally, stipulated to the factual basis for the plea. Carol would testify that she and defendant, her husband, were at or near their home on the night in question when an argument escalated into defendant striking her with a bludgeon three times in the head in an attempt to kill her or do her great bodily harm, and she was brought to a hospital. Hospital personnel would testify that Carol was in serious to critical condition and was

treated for neurological damage that she was still suffering. A police detective would testify that defendant was arrested that night and, after being informed of his *Miranda* rights, voluntarily admitted to striking Carol. The detective would also testify to finding a pistol outside the home, which defendant admitted was his "in violation of the statute." The evidence would show that defendant had a felony conviction for possession of a controlled substance in case 94 CR 2214.

¶ 13 The court asked defendant "[a]re you satisfied with the representation of your attorney?" and he replied "Yes." The court found his plea to be voluntary and found him guilty of the amended attempted murder charge and UUWF. The State nol-prossed the other charges and told the court that defendant had no prior convictions but the aforesaid controlled substance conviction. Defendant waived a presentencing investigation. The court sentenced him to concurrent prison terms of 20 years for attempted murder and 7 years for UUWF, with fines and fees and with 699 days' credit. It admonished him regarding his appeal rights.

¶ 14 Defendant did not file a motion to withdraw his plea or a notice of direct appeal.

¶ 15 Defendant filed his *pro se* postconviction petition on January 5, 2016. He argued that he entered into a "coerced plea offer" due to trial and plea counsel's deficient performance. He alleged that counsel failed to investigate or present defendant's claim that Carol had the gun in her hand when she knocked on the door of a neighbor, identified only as "Joe," and then threw the gun into the bushes when Joe answered the door. He alleged that testing would show Carol's fingerprints on the gun, while no gunshot residue testing was performed on defendant. He alleged that Carol visited him several times in jail, apologized for accusing him of shooting her, and said "that she wished she would not have had the gun then none of this would have happened." He alleged that plea counsel told him that she would subpoena the jail visitor logs

and interview Carol "but never did either." He alleged that trial and plea counsel conducted "no pre-trial investigation, or viable defense discussion with defendant, not even so much as going over discovery material with defendant" in the entire period from his arrest until his plea. He alleged that he was presented with a 20-year plea offer for aggravated battery alone, with all other charges dropped, on the day scheduled for the hearing on the motion to suppress, "leading defendant to believe the motion was going to be denied."

¶ 16 The only affidavits attached to the petition were defendant's own December 2015 affidavits. He addressed the absence of an affidavit from "Joe" in the petition: "Defendant is unable to contact Joe at this time due to his incarceration and the time that elapsed since arrest, his residence is listed in police reports in this case." Defendant did not address the absence of an affidavit from Carol, nor how he knew that plea counsel had not subpoenaed the jail visitor logs or interviewed Carol. Defendant averred that neighbor Joe told him about the gun, and he told plea counsel about Joe's account and the absence of gunshot residue testing. He averred that counsel "never had a conversation with me in any attempt to prepare a defense in this case, never went over any discovery with me, [and] never did any type of pretrial investigation." He also averred that plea counsel told him "the State was reducing the charges down to Aggravated Battery in exchange for a guilty plea" and he "felt I had no other choice [but] to plead guilty because my attorney was not even attempting to prepare a defense."

¶ 17 The court remarked on January 21, 2016, that defendant filed a postconviction petition earlier that month. It dismissed the petition on March 4, 2016, stating "I have previously reviewed this petition and it is insufficient to state a cause of action warranting the docketing." The record does not include a written dismissal order, but the clerk of the court recorded "PC

dismissed" on its half-sheet or docket page for March 4, 2016. The clerk also sent defendant a letter on March 11, 2016, stating that the court dismissed his petition on March 4.

¶ 18 On appeal, defendant primarily contends that his postconviction petition should not have been summarily dismissed because it stated the gist of a meritorious claim: trial and plea counsel rendered ineffective assistance by not investigating potentially exculpatory evidence or discussing any viable defenses, which led defendant to believe that he had no viable defense or alternative to pleading guilty.

¶ 19 A postconviction petition may be summarily dismissed at the first stage, within 90 days of filing, if "the court determines the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2016); *People v. Dupree*, 2018 IL 122307, ¶ 28. A petition not summarily dismissed is docketed for further proceedings, often called the second stage. 725 ILCS 5/122-2.1(b) (West 2016); *Dupree*, 2018 IL 122307, ¶ 28. The State may file a motion to dismiss a petition at the second stage, and the court grants such a motion if the petition does not make a substantial showing of a constitutional claim. 725 ILCS 5/122-5 (West 2016); *Dupree*, 2018 IL 122307, ¶ 28. If the petition is not dismissed, it proceeds to the third stage, where the court may hold an evidentiary hearing. 725 ILCS 5/122-6 (West 2016); *Dupree*, 2018 IL 122307, ¶ 28.

¶ 20 The court here dismissed the petition at the first stage. A petition may be summarily dismissed if it has no arguable basis in law or fact because it relies on an indisputably meritless legal theory or a fanciful factual allegation, or it is substantially incomplete because it does not include objective or independent corroboration of its factual allegations. *People v. Boykins*, 2017 IL 121365, ¶ 9; *People v. Allen*, 2015 IL 113135, ¶¶ 24-26. Summary dismissal is inappropriate if the petition alleges sufficient facts to state the gist of a constitutional claim but lacks legal

argument or citations to authority. *Allen*, 2015 IL 113135, ¶ 24. Summary dismissal is appropriate if the petition lacks "affidavits, records, or other evidence supporting its allegations," or an explanation of why evidence is not attached. 725 ILCS 5/122-2 (West 2016); *Allen*, 2015 IL 113135, ¶ 26. The requirement "is that the supporting evidence sufficiently demonstrate the alleged constitutional deprivation." *Dupree*, 2018 IL 122307, ¶ 32. Generally, for a claim that counsel was ineffective for failing to call or investigate a witness, "without an affidavit [from the proposed witness], there can be no way to assess whether the proposed witness could have provided evidence that would have been helpful to the defense." *Id*. ¶ 34. At the first stage, documented factual allegations are generally accepted as true and construed liberally. *Allen*, 2015 IL 113135, ¶¶ 25-26. We review *de novo* the summary dismissal of a postconviction petition. *Boykins*, 2017 IL 121365, ¶ 9.

¶ 21 The right to effective assistance of counsel includes guilty-plea proceedings. *People v. Brown*, 2017 IL 121681, ¶¶ 25-26. Claims of ineffective assistance of counsel, including guilty plea counsel, are governed by the familiar two-pronged test whereby a defendant must establish both that counsel's performance fell below an objective standard of reasonableness and that he was prejudiced by counsel's deficient performance. *Id.* In a dismissal at the first stage, as here, a petition claiming ineffectiveness is not summarily dismissed if the defendant shows that counsel's performance was arguably unreasonable and the defendant was arguably prejudiced as a result. *People v. Brown*, 2017 IL App (1st) 150203, ¶ 24.

¶ 22 Here, defendant provides no objective or independent corroboration of his claims. First and foremost, he provides no affidavit from the neighbor he identifies only as Joe. While defendant offers an explanation for not presenting an affidavit from Joe, his explanation is

essentially that he is incarcerated. He does not describe any efforts he made to obtain Joe's affidavit, nor anything beyond his incarceration and the passage of time that thwarted such efforts. However, the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2016)) applies to individuals "imprisoned in the penitentiary" and nonetheless includes the affidavit requirement. 725 ILCS 5/122-1, 122-2 (West 2016). As the Act clearly contemplates that defendants seeking postconviction relief are likely to be imprisoned, we find that the mere fact that a defendant is incarcerated does not adequately explain his failure to obtain an affidavit.

¶ 23 Defendant also does not provide an affidavit from Carol, nor offer any explanation of its absence, despite claiming that she repeatedly apologized for accusing him of shooting her. Without affidavits from Joe and Carol, defendant's petition does not include objective corroboration of his claims regarding Joe and Carol. "[W]ithout their affidavits, it was impossible to determine whether the proposed witnesses could have provided any information or testimony favorable to defendant." *Dupree*, 2018 IL 122307, ¶ 37.

¶ 24 Defendant's allegation that plea counsel did not obtain the jail visitor logs or interview Carol, after telling defendant she would, is merely conclusory. Defendant provides no basis – no objective or independent corroboration such as an affidavit by Carol – for his assertion that plea counsel did not do so. See *Dupree*, 2018 IL 122307, ¶ 36 ("what precluded our review was the fact that there was nothing in the record to support the defendant's assertion that counsel had not spoken to these women"). Indeed, the record indicates that plea counsel subpoenaed jail records, though she did not specify for the court that they were visitor logs.

¶ 25 Similarly, the record belies defendant's claim that counsel made no effort to investigate that Carol had the gun, as trial counsel successfully requested testing of the gun for Carol's

fingerprints, and the results of that testing were provided to plea counsel. Lastly, the record belies that defendant believed he was pleading guilty to aggravated battery. At the plea hearing, the State and plea counsel told the court that defendant would plead guilty to attempted murder as amended to eliminate firearm allegations, and defendant agreed that this was the plea agreement.

¶ 26 In summary, the allegations in defendant's petition were either conclusory, unsupported by objective and independent corroboration, or refuted by the record. We conclude that the summary dismissal of defendant's petition was not erroneous.

¶ 27 Defendant also contends that the trial court erred by not issuing a written order summarily dismissing his petition, and by applying an inappropriate standard in its dismissal.

¶ 28 When the court finds a petition at the first stage to be frivolous or patently without merit, "it shall dismiss the petition in a written order, specifying the findings of fact and conclusions of law it made in reaching its decision." 725 ILCS 5/122-2.1(a)(2) (West 2016). However, this provision is directory rather than mandatory. *People v. Porter*, 122 Ill. 2d 64, 81-82 (1988); *People v. Cooper*, 2015 IL App (1st) 132971, ¶ 9. In *Porter*, our supreme court held that this statutory provision requires that the trial court dismiss a petition it finds frivolous and patently without merit, but merely directs that the court do so in a written order with findings. *Porter*, 122 Ill. 2d at 81-82. In so holding, the supreme court in *Porter* stated that "our conclusion that the statutory provision in question here is directory as to the entry of the written order and its contents rather than mandatory" was consistent with its earlier jurisprudence. *Porter*, 122 Ill. 2d at 82.

¶ 29 In *Cooper*, this court reviewed the summary dismissal of a postconviction petition where no written order was issued but the court's decision was reflected on the docket entry or half-sheet and notice of the court's decision was sent to the defendant. *Cooper*, 2015 IL App (1st) 132971, ¶ 7. The report of proceedings or transcript for the day the court announced its decision was not in the record. *Id*. The *Cooper* defendant relied on the lack of findings to argue that the summary dismissal was on the improper basis of untimeliness. *Id*. ¶ 8. Following *Porter*, the *Cooper* court held that the statutory provision requiring a written order with findings is directory. *Id*. ¶ 9 (citing *Porter*, 122 Ill. 2d at 81-82). We found that a "written order of summary dismissal is not required" so long as the dismissal "decision is entered of record," including sending it to the defendant. *Id*. ¶ 14 (citing *People v. Perez*, 2014 IL 115927, ¶¶ 15, 29).

> "[T]he court reached a decision on July 24 to dismiss Cooper's petition, and that decision was clearly communicated to the clerk of the court and spread of record, as documented by the July 24 docket or 'half-sheet' entry of dismissal. The order is further evidenced by the certified report of disposition, referring to a July 24 dismissal, sent to Cooper on August 5 ***. The entry of a dismissal order on July 24 does not depend on the record containing a transcript for that day or an order signed by the judge himself." *Id*.

¶ 30 Here, the court's dismissal decision of March 4, 2016, well within 90 days of the petition's filing on January 5, 2016, was reflected in the March 4 report of proceedings and recorded on the half-sheet or docket page for March 4, and written notice thereof was sent to defendant on March 11, 2016. See 725 ILCS 5/122-2.1(a)(2) (West 2014) ("Such order of dismissal *** shall be served upon the petitioner by certified mail within 10 days of its entry").

We see no reason not to follow our decision in *Cooper*, and thus find that the summary dismissal of defendant's petition was properly entered of record within 90 days of the petition's filing.

¶ 31 Against such a conclusion, defendant contends that the lack of an order of dismissal with written findings within 90 days requires that his petition be advanced to the second stage, relying heavily upon *People v. Perez*, 2014 IL 115927. However, that issue was not before the *Perez* court, which considered the timeliness of a written dismissal order signed on the 90th day from filing but not entered or recorded until the next day. *Perez*, 2014 IL 115927, ¶ 1. The *Perez* court concluded that the dismissal order entered on the 91st day was not timely under the Act. *Id*. The *Perez* decision does not address or even mention *Porter*, and we shall not find that the supreme court in *Perez* reversed or narrowed its express and well-considered holding in *Porter* wholly implicitly. We acknowledge that the *Perez* court indicated that merely announcing a dismissal in open court within 90 days may not be sufficient under section 122-2.1(a)(2). *Id*. ¶ 23. However, this case does not concern a bare oral pronouncement, as the court's decision was recorded on the half-sheet or docket page for that day, and written notice of the court's decision was timely sent to defendant.

¶ 32 Defendant also contends that his petition should be advanced to second-stage proceedings because the court held his petition to the second-stage dismissal standard (a substantial showing of a constitutional claim) rather than the summary-dismissal standard (a gist of a meritorious constitutional claim) when the court found his petition "insufficient to state a cause of action warranting docketing."

¶ 33 We disagree. The record shows that the court was aware in January 2016 that the petition was filed that month. The court stated in March 2016, about six weeks later and thus well within

the 90-day first stage, that it had reviewed the petition. In doing so, the court made no reference to a (non-existent) State motion to dismiss as would apply at the second stage. Lastly, the court found the petition "insufficient to state a cause of action warranting [its] docketing," and docketing is the appropriate action for a first-stage petition not summarily dismissed. 725 ILCS 5/122-2.1(b) (West 2016)("If the petition is not dismissed pursuant to this Section, the court shall order the petition to be docketed for further consideration"). The court is presumed to know and follow the law (*In re Custody of G.L.*, 2017 IL App (1st) 163171, ¶ 43), and we will not conclude on this record that it believed it was granting a motion to dismiss the petition at the second stage. Stated another way, we will not presume that the court, aware the petition was at the first stage, erroneously applied the second-stage standard merely because its oral finding "insufficient to state a cause of action warranting docketing" omitted the words "the gist of" or "frivolous and patently without merit."

¶ 34 Lastly, defendant seeks to receive presentencing custody credit against his fines.

¶ 35 He did not raise this claim in the trial court proceedings or his postconviction petition, but raises it for the first time on appeal from the latter. Our supreme court has held that we may grant credit against fines, claimed for the first time on appeal from the disposition of a postconviction petition, if such a grant is a simple ministerial act because the basis for granting credit is clear from the record. *People v. Caballero*, 228 Ill. 2d 79, 87-88 (2008); see also *Brown*, 2017 IL App (1st) 150203, ¶¶ 37-39 (following *Caballero* regarding fines listed as such in trial court order).

¶ 36 Defendant's 699 days of presentencing custody entitle him to up to $3495 credit against his fines at the statutory $5 per day. 725 ILCS 5/110-14(a) (West 2016). The parties correctly agree that defendant is due credit on $60 in fines listed as such in the trial court's order: $30 each

for the Children's Advocacy Center and for juvenile expungement. 55 ILCS 5/5-1101(f-5) (West 2016); 730 ILCS 5/5-9-1.17(a) (West 2016). We so order.

¶ 37 However, defendant also seeks credit for a charge – the $50 court system charge (55 ILCS 5/5-1101(c) (West 2016)) – listed in the trial court order as a fee or cost not subject to credit. We have held that challenging charges as fines when the trial court order lists them as fees or costs is a substantive claim, not a ministerial correction, and thus does not fall under *Caballero*. *People v. Smith*, 2018 IL App (1st) 151402, ¶ 6; *Brown*, 2017 IL App (1st) 150203, ¶¶ 39-40. Moreover, we have held that we lack independent subject-matter jurisdiction over such substantive claims raised for the first time on appeal from the disposition of a postconviction petition. *Brown*, 2017 IL App (1st) 150203, ¶ 40; but see *People v. Mullen*, 2018 IL App (1st) 152306, ¶¶ 33-42. The State does not argue that we lack jurisdiction over this claim. It acknowledges that defendant has forfeited the claim but agrees with him that it is reviewable and addresses its merits. However, the State cannot forfeit our lack of jurisdiction over this claim nor revest us with jurisdiction under these circumstances. *Brown*, 2017 IL App (1st) 150203, ¶ 42.

¶ 38 Accordingly, the instant judgment of the circuit court is affirmed. We direct the clerk of the circuit court to correct the fines and fees order to reflect $60 credit.

¶ 39 Affirmed, order corrected.