2019 IL App (4th) 170120-U

NO. 4-17-0120

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
May 13, 2019
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
ANTHONY BLISSIT	)	No. 16CF10
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

PRESIDING JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Cavanagh and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding the trial court did not err in summarily dismissing defendant's postconviction petition.

¶ 2 In December 2016, defendant, Anthony Blissit, filed a *pro se* postconviction petition, claiming he received ineffective assistance of counsel where defense counsel advised defendant to plead guilty to aggravated battery of a peace officer (720 ILCS 5/12-3.05(d)(4)(i) (West 2014)) despite an alleged lack of evidence supporting the charge. In January 2017, the trial court summarily dismissed the petition as frivolous and patently without merit.

¶ 3 Defendant appeals, asserting his petition stated the gist of a constitutional claim sufficient to overcome first-stage summary dismissal. For the following reasons, we affirm.

¶ 4 I. BACKGROUND

¶ 5 A. The Information

¶ 6 On January 4, 2016, the State charged defendant by information with aggravated battery (count I) (720 ILCS 5/12-3.05(d)(4)(i) (West 2014)), resisting a peace officer (count II) (720 ILCS 5/31-1(a-7) (West 2014)), and attempt to disarm a peace officer (count III) (720 ILCS 5/31-1a(b) (West 2014)).

¶ 7 B. The Plea Hearing

¶ 8 On February 3, 2016, the trial court held a guilty plea hearing. The court admonished defendant of the rights he would be waiving by pleading guilty and stated the following in explaining the possible penalties for count I:

> "THE COURT: Now this is a Class 2 felony. That means you could be sent to prison for not less than three nor more than seven years. That would be followed by a period of mandatory supervised release of two years. Your maximum fine could be up to $25,000. So you understand those are the maximum penalties.
>
> THE DEFENDANT: Yes.
>
> THE COURT: And you're going to plead guilty, is that right?
>
> THE DEFENDANT: Yes.
>
> * * *
>
> THE COURT: Is your plea of guilty today voluntary? Is this of your own free will?
>
> THE DEFENDANT: Yes."

Defendant pleaded guilty to count I in exchange for the State's agreement to dismiss counts II and III and the charges in an unrelated case (case No. 15-CF-1763).

¶ 9 For the factual basis, the State indicated that around 12:30 a.m. on January 1, 2016, officers were dispatched to defendant's mother's home because of a dispute between

defendant and his mother. Upon arrival, the officers learned of an outstanding arrest warrant for defendant. The officers advised defendant of the warrant, and defendant became "visibly anxious." Conscious of the possibility of flight, two officers held defendant's wrists and attempted to handcuff him. "Defendant ripped his arms away from their grasp and pushed them aside." Defendant fell, quickly got up, turned back towards one of the officers, and "ran into [the officer] with his head and shoulder lowered." Both defendant and the officer fell to the ground and a struggle ensued before several officers were able to handcuff defendant and place him in custody.

¶ 10 Finding the factual basis sufficient, the trial court accepted defendant's guilty plea and, in accordance with the plea agreement, sentenced defendant to 5 years' imprisonment with credit for 32 days served. Defendant did not file a postplea motion or direct appeal.

¶ 11 C. Postconviction Petition

¶ 12 On December 12, 2016, defendant filed a *pro se* petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2014)), alleging ineffective assistance of counsel during the plea-bargaining process. Defendant's petition alleged counsel rendered ineffective assistance by providing erroneous advice, which ultimately forced defendant to plead guilty to a crime he did not commit. Defendant specifically alleged: (1) he informed counsel "he did not hit or attempt to hit the officers"; (2) he told counsel he was only guilty of attempting to flee; (3) counsel informed him that a video of the incident did not show him committing aggravated battery, but he would still be convicted because of his criminal history and the fact a police officer is viewed as a more credible witness; and (4) counsel's "wrongful advice ultimately forced [defendant] to plead to a[n] offense he did not commit ***."

¶ 13 In support of his argument, defendant attached to his petition the incident reports of the arresting officers, William Cowan and Kristina Haugen. Defendant also attached a document titled "Defendant's Answers to Interrogatories." The document referenced an action in a federal district court filed by defendant against Officer Cowan. Interrogatory number 6 stated:

> "Please provide to the extent of Defendant's knowledge and ability to secure the name, office and title[,] telephone number and address of all persons having knowledge pertaining to the facts alleged in Plaintiff's complaint and the defenses and factual assertions in Defendant's answer. Please include in your answer a specific description of the nature of that knowledge, and if this person witnessed Plaintiff *** reach for Defendant's gun or any other police officer's weapon or if Plaintiff struck any one during the course of the alleged struggle in Defendant's factual assertions."

In response, Officer Cowan stated: "Plaintiff had pushed [Officer Haugen] in the initial attempt to flee. Plaintiff struggled with me, but I do not believe he 'struck' me at any time."

¶ 14 Defendant contended the allegations in his petition and the attached exhibits demonstrated counsel advised him to plead guilty to a crime he did not commit. Defendant highlighted an alleged inconsistency in the two incident reports to support his allegation that he did not commit aggravated battery. Specifically, he pointed to the fact that Officer Cowan's incident report stated, "[Defendant] broke his arms free and pushed through [m]yself and Officer Haugen. [Defendant] fell lost his footing and fell to the ground. He quickly got to his feet, turned in my direction, and *ran into me with his head and shoulder lowered*." (Emphasis added.) Officer

Haugen's description of the event indicated, "I again tried to grab [defendant's] right arm in order to handcuff him. When [Officer] Cowan grabbed his left arm he pushed through [Officer] Cowan in order to flee the scene on foot. I chased after [defendant] and was able to grab his pants while he and [Officer] Cowan fell to the ground." Because Officer Haugen never mentioned defendant running into Officer Cowan with his head and shoulder lowered, defendant argued that the discrepancy demonstrated he did not charge at Officer Cowan and therefore did not commit aggravated battery. Thus, defendant asserted, defense counsel rendered ineffective assistance by erroneously advising him he would be convicted of aggravated battery at trial despite insufficient evidence to support such a conviction.

¶ 15 D. Trial Court's First-Stage Summary Dismissal

¶ 16 In January 2017, the trial court summarily dismissed defendant's petition as frivolous and patently without merit. In its written order, the court noted the incident reports attached to defendant's petition clearly demonstrated "he was engaged in a violent confrontation with the officers who were trying to arrest him." Moreover, the court found the "fact that the officer's reports were not identical in describing the violent resistance" was immaterial to the injury sustained by one of the officers.

¶ 17 This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 On appeal, defendant asserts the trial court erred by summarily dismissing his postconviction petition during the first stage of proceedings. Specifically, defendant contends his allegation plea counsel erroneously advised him to plead guilty despite insufficient evidence to support a conviction stated the gist of an ineffective-assistance-of-counsel claim. Additionally, he argues he is entitled to $5 in *per diem* credit to be applied to his credit-eligible fines.

¶ 20 A. Standard of Review

¶ 21 The Act (725 ILCS 5/122-1 to 122-7 (West 2014)) provides for a three-stage procedure through which criminal defendants may assert their convictions occurred due to a substantial denial of their constitutional rights. *People v. Guerrero*, 2012 IL 112020, ¶ 14. To survive summary dismissal, the petition need only present the gist of a constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). At the first stage, the trial court must independently review the petition, taking the allegations as true and liberally construing them in favor of the defendant, to determine whether it is frivolous or patently without merit. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). A petition is frivolous or patently without merit only if it has no arguable basis in law or fact. *Id*. at 16. A petition lacks an arguable basis in law or fact if it is "based on an indisputably meritless legal theory," such as one "completely contradicted by the record" or "a fanciful factual allegation." *Id*.

¶ 22 B. Ineffective Assistance of Counsel

¶ 23 Defendant alleges his guilty plea resulted from the substantial denial of his constitutional right to the effective assistance of counsel. A challenge to a guilty plea alleging ineffective assistance of counsel is subject to the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), *i.e.*, deficiency and prejudice. *Hill v. Lockhart*, 474 U.S. 52, 57 (1985); *People v. Hall*, 217 Ill. 2d 324, 334-35 (2005). "At the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance 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. Defendant must satisfy both prongs; thus, if he fails to satisfy either, we may dispose of his claim on that prong alone. See *People v. Clendenin*, 238 Ill. 2d 302, 317-18 (2010).

¶ 24 1. *Deficiency*

¶ 25 In the context of a guilty plea, counsel performs below an objective standard of reasonableness if he or she fails to ensure the defendant's guilty plea was entered voluntarily and intelligently. *Hall*, 217 Ill. 2d at 335. Defendant alleged counsel's "wrongful advice ultimately forced [him] to plead to a[n] offense he did not commit ***." At this stage of postconviction proceedings, we are required to take all allegations as true unless "positively rebutted" by the record. *People v. Coleman*, 183 Ill. 2d 366, 385 (1998). The record positively rebuts defendant's allegation he was forced to enter his guilty plea; as a result, we find defendant cannot show it is arguable counsel's performance was objectively unreasonable.

¶ 26 The record demonstrates that during the plea hearing, the trial court admonished defendant regarding the offense to which he pleaded, including the possible sentencing ranges and the rights he would be giving up by pleading guilty, and defendant repeatedly indicated that he understood. He was present in the courtroom when the State offered the factual basis for the plea. At no point did he object to the factual basis or indicate he was forced to plead guilty. To the contrary, defendant indicated that no one forced him to plead guilty and that his plea of guilty was voluntarily made and "of [his] own free will." Thus, the record positively rebuts any argument he did not enter his guilty plea voluntarily and intelligently.

¶ 27 Accordingly, because defendant's allegation that defense counsel forced him to plead guilty is positively rebutted by the record, we conclude the trial court properly dismissed defendant's postconviction petition at the first stage of proceedings. See *People v. Palmer*, 2017 IL App (4th) 150020, ¶ 17 ("If a defendant fails to prove either prong of the *Strickland* test, his claim for ineffective assistance of counsel must fail.").

¶ 28 2. *Prejudice*

¶ 29 Even if we were to assume plea counsel's performance was objectively unreasonable, defendant is unable to show it is arguable he suffered prejudice.

¶ 30 To establish prejudice, "the defendant must show there is a reasonable probability that, absent counsel's errors, the defendant would have pleaded not guilty and insisted on going to trial." *Hall*, 217 Ill. 2d at 335. A bare allegation that he would not have pleaded guilty and insisted on a trial is not enough. *Id*. "Rather, the defendant's claim must be accompanied by either a claim of innocence or the articulation of a plausible defense that could have been raised at trial." *Id*. at 335-36. "[W]hether counsel's deficient representation caused the defendant to plead guilty depends in large part on predicting whether the defendant likely would have been successful at trial." *Id*. at 336.

¶ 31 Defendant argues he was prejudiced by defense counsel's deficient performance. In his reply brief, defendant denies asserting a claim of actual innocence. Instead, he argues defense counsel's failure to properly review and assess the evidence led defendant to enter a plea in spite of insufficient evidence. Defendant's theory is that because he alleged he did not "hit," "attempt to hit," or charge "Officer Cowan with [his] head and shoulder lowered," and the record does not positively rebut these allegations, it is arguable he did not commit aggravated battery. However, even taking these allegations as true, defendant's theory that he did not commit aggravated battery is "completely contradicted by the record," and the trial court properly dismissed his petition as frivolous and patently without merit, as it has no arguable basis in law. *Hodges*, 234 Ill. 2d at 16.

¶ 32 Defendant's theory has no arguable basis in law because whether he hit, attempted to hit, or charged at Officer Cowan with his head and shoulder lowered is not dispositive of whether he committed aggravated battery. Defendant pleaded guilty to a violation

of section 5/12-3.05(d)(4)(i) of the Criminal Code of 2012 (720 ILCS 5/12-3.05(d)(4)(i) (West 2014)), aggravated battery of a peace officer. To convict defendant of this offense, the State needed to prove beyond a reasonable doubt that defendant committed a battery in that he "knowingly without legal justification by any means (1) cause[d] bodily harm to an individual or (2) [made] physical contact of an insulting or provoking nature with an individual" and knew the individual battered to be a peace officer performing his or her official duties. 720 ILCS 5/12-3(a), 12-3.05(d)(4)(i) (West 2014). Defendant does not argue he did not know Officer Cowan to be a peace officer performing his official duties, and thus, we need not address this element of the offense. 720 ILCS 5/12-3.05(d)(4)(i) (West 2014).

¶ 33 The record clearly demonstrates that, at the very least, defendant knowingly made "physical contact of an insulting or provoking nature" with Officer Cowan. 720 ILCS 5/12-3(a) (West 2014). The State averred at the plea hearing it would call Officers Cowan and Haugen to testify at trial. Defendant attached to his petition the incident reports of both officers. Each report corroborates the following scene. Upon learning of his outstanding arrest warrant, defendant grew visibly anxious. Believing him about to flee, the officers grabbed both of his wrists in an effort to place him in handcuffs. Defendant broke free of their grips and "pushed through" Officer Cowan in order to flee. The officers attempted to subdue defendant numerous times, and defendant continued to "defeat" their grasps and "pull away" from them. After all three parties to the incident had fallen to the ground in a struggle at least once, Officer Haugen notes that she "got back up and [Officer] Cowan was still fighting with [defendant] ***." Both officers continued to struggle with defendant until backup arrived and defendant was placed in custody. Given the overwhelming evidence that would have been presented against him at trial, we cannot say that defendant "likely would have been successful at trial." *Hall*, 217 Ill. 2d at 336. Thus, we

cannot find there is a reasonable probability that absent counsel's errors, if we assume error, that defendant would have pleaded not guilty and insisted on going to trial.

¶ 34 We decline to accept defendant's contention that at no point during his confrontation with Officers Cowan and Haugen—in which he (1) broke free of their hold on his wrists, (2) "pushed through" Officer Cowan in order to flee, and (3) struggled with the officers to the point that all three ended up on the ground numerous times—did he knowingly make "physical contact of an insulting or provoking nature" with one of the officers. 720 ILCS 5/12-3(a) (West 2014). Accordingly, because defendant's petition is based on the theory that the evidence is insufficient to prove he committed aggravated battery, and this theory is "completely contradicted by the record," we conclude the trial court properly dismissed defendant's petition at the first stage of proceedings. *Hodges*, 234 Ill. 2d at 16.

¶ 35 C. *Per Diem* Credit

¶ 36 Defendant argues he is entitled to $5 in *per diem* credit for time spent in custody. See 725 ILCS 5/110-14(a) (West 2014) (allowing a $5 per day credit against fines for time spent in custody on a bailable offense).

¶ 37 Illinois Supreme Court Rule 472 (eff. Mar. 1, 2019) states the trial court retains jurisdiction to correct errors in the application of *per diem* credit against fines. Moreover, no appeal may be taken on the ground of an error in the application of *per diem* credit "unless such alleged error has first been raised in the [trial] court." Ill. S. Ct. R. 472(c) (eff. Mar. 1, 2019). The record does not show defendant raised the alleged error in the trial court. Because the trial court retains jurisdiction to correct the alleged error, we lack jurisdiction to address this issue.

¶ 38 III. CONCLUSION

¶ 39 For the reasons stated, we affirm the trial court's judgment summarily dismissing defendant's postconviction petition. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2016).

¶ 40 Affirmed.