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2012 IL App (1st) 091647-U

FOURTH DIVISION
May 17, 2012

No. 1-09-1647

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	Nos. 07 CR 6101
	)	07 CR 7148
	)	
TROY GASTON,	)	Honorable
	)	Diane Gordon Cannon,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE STERBA delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

O R D E R

¶ 1 *Held*: Where defendant's first stage *pro se* postconviction petition alleged an arguable claim for ineffective assistance of counsel, the trial court erred in summarily dismissing the petition.

¶ 2 Defendant Troy Gaston appeals from the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq*. (West 2008). On appeal, defendant contends, and the State concedes, that his petition presented an arguable claim of ineffective assistance of counsel based on counsel allegedly providing defendant with

inaccurate information about his potential sentence. We reverse and remand for further proceedings.

¶ 3 Defendant was charged with one count of burglary, two counts of forgery, and one count of unlawful use of a credit card. At a jury trial, the State's evidence established that on March 6, 2007, defendant and his codefendants, Tracey Poe and Latasha Richardson, who are not parties to this appeal, entered an office building at 211 East Ontario Street where defendant was seen near the cubicle of Cassandra Mead. Shortly after he departed, Mead returned to her cubicle and discovered her credit card was missing. Defendant, Poe, and Richardson then proceeded to the Nike Town store at 669 North Michigan Avenue and used Mead's credit card to purchase merchandise in two separate transactions, totaling $188.56 and $556.80, respectively. For both transactions, Poe signed the sales slip "Cassandra Mead."

¶ 4 The jury found defendant guilty of burglary and forgery. The trial court sentenced defendant as a Class X offender based on his criminal history to a 20-year prison term for the burglary conviction and additionally sentenced him to two 5-year sentences for the forgery convictions, all sentences to run concurrent.

¶ 5 On direct appeal, this court found that the trial court erred in sentencing defendant on both forgery convictions because the jury was only given one verdict form for the crime of forgery. We reversed defendant's forgery convictions and remanded the cause for a new trial as to both counts of forgery. The burglary conviction and sentence were affirmed. *People v. Gaston*, No. 1-08-0764 (2010) (unpublished order under Supreme Court Rule 23). On remand, the State nolle-prossed the forgery charges.

¶ 6 In May 2009, while the direct appeal was pending, defendant filed the instant postconviction petition alleging, *inter alia*, he received ineffective assistance of counsel based on

counsel's failure to "properly advised [*sic*] defendant of maximum sentence that he could receive." Specifically, defendant alleged that:

> "Defendant [*sic*] counsel improperly advised him that the crime with which he was charged carried a maximum sentence of 30 years for each offense, when in reality, Gaston could've have [*sic*] received a sentence of 6[ ] years. The defendant was prejudice [*sic*] by this in-correct information when he ultimately received a 20 year sentence, because had he known that he could receive such a severe sentence, he would have accepted the state's plea offer which were [*sic*] six years."

We note correction fluid was used to white out two portions of the petition that was included in the record on appeal. First, the number "30" in the petition was handwritten over correction fluid. The number "6" is also immediately followed by a spot covered with correction fluid.

¶ 7 In June 2009, the trial court dismissed defendant's petition.

¶ 8 On appeal, defendant contends that his petition adequately presented an arguable claim of ineffective assistance of counsel based on his allegation that counsel gave him inaccurate information about his potential sentence and that, had he known the maximum possible sentence he faced, he would have accepted the State's plea offer of six years. Instead, defendant went to trial and received a much more severe sentence of 20 years.

¶ 9 We review the summary dismissal of a postconviction petition *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). At the first stage of postconviction proceedings, a petition will only be dismissed if it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2008); *People v. Brown*, 236 Ill. 2d 175, 184 (2010). A petition is considered frivolous or without merit if it has "no arguable basis either in law or fact." *Hodges*, 234 Ill. 2d at 11-12.

Petitions based on meritless legal theory or fanciful factual allegations will be dismissed. *Hodges*, 234 Ill. 2d at 16.

¶ 10 In particular, a first stage petition claiming ineffective assistance of counsel must show that it is arguable that counsel's performance fell below an objective standard of reasonableness and that it is arguable defendant was prejudiced by counsel's performance. *Hodges*, 234 Ill. 2d at 17.

¶ 11 Here, the State concedes defendant's claim is based on a meritorious legal theory. The United States Supreme Court recently held that "criminal defendants require effective counsel during plea negotiations." *Missouri v. Frye*, 132 S. Ct. 1399, 1408-09 (2012). The Supreme Court also specifically recognized that a defendant may be entitled to relief if he rejected a plea offer based on incompetent advice from counsel and can show that, but for counsel's incompetent advice, the ultimate outcome of the plea process would have been different. *Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012). Thus, if counsel provided defendant with incompetent advice during plea proceedings thereby causing defendant to reject the State's plea offer, defendant's legal theory does not lack merit.

¶ 12 Furthermore, defendant has provided an arguable factual basis for his claim. Defendant interprets the allegation in his petition to mean that he did not know he could receive a possible sentence of 30 years. The State accepts this interpretation in its concession, using the liberal construction allowed for *pro se* postconviction petitions (*People v. Jones*, 211 Ill. 2d 140, 148 (2004)), and agreeing with defendant that he did not know he could receive a 30-year prison sentence. We will accept the parties' agreed-upon interpretation. Moreover, the context of defendant's allegations indicates he was not aware of the maximum sentence for which he was eligible and he specifically alleged he would have taken the State's six-year offer if he had known he was facing "such a severe sentence." Under these circumstances, defendant's factual

allegations are not fanciful. Therefore, we conclude that defendant sufficiently alleged an arguable claim of ineffective assistance of counsel and is entitled to a remand of his cause for further postconviction proceedings.

¶ 13 For the foregoing reasons, we reverse the ruling of the trial court and remand for further proceedings consistent with this opinion.

¶ 14 Reversed and remanded.