2012 IL App (2d) 110527-U
No. 2-11-0527
Order filed September 21, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. THOMAS R. GREEN, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 03-CF-1996 Honorable Stephen G. Vecchio, Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

Held: The trial court properly dismissed defendant's postconviction petition: defendant's guilty plea was not invalid, as his alleged mistaken impression—that his sentence would be concurrent with a Wisconsin sentence—was clearly unjustified in light of the trial court's admonishments.

¶ 1 Defendant, Thomas R. Green, appeals from an order of the circuit court of Winnebago County summarily dismissing his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)) from his conviction of second-degree murder (720 ILCS 5/9-2(a)(2) (West 2002)) in connection with the 2003 shooting death of Desmond Gray.

Defendant's conviction resulted from a negotiated guilty plea. Pursuant to defendant's agreement with the State, the trial court sentenced defendant to a 17-year prison term. At the time of the offense, defendant was on parole for an offense committed in Wisconsin and faced additional incarceration in Wisconsin for violating his parole. Defendant argues on appeal that the petition should have been allowed to proceed because it stated the gist of a constitutional claim—that because he pleaded guilty based on the mistaken belief that his sentence would run concurrently with any additional time he would serve in Wisconsin for his parole violation, he did not enter his plea knowingly and understandingly. We disagree and therefore affirm.

¶ 2 On March 16, 2004, before defendant entered his guilty plea, his attorney, Edward Light, advised the trial court that the parties had reached a tentative plea agreement, which provided that defendant's sentence "would be concurrent with the Wisconsin, any violation that they did there." Light noted that Wisconsin officials had given preliminary indications that defendant could serve any prison term for his parole violation concurrently with his sentence in Illinois. He added that the tentative agreement would be in jeopardy if Wisconsin officials were not amenable to concurrent sentences. Light conceded that it was unclear whether an Illinois judgment specifying how the sentences were to be served would be binding in Wisconsin. He requested more time to attempt to secure definitive assurances from Wisconsin officials that defendant's Illinois and Wisconsin sentences would be served concurrently. The trial court continued the matter to March 17, 2004, for status. On that date the court conducted a conference pursuant to Illinois Supreme Court Rule 402(d)(2) (eff. July 1, 1997) to consider the parties' tentative plea agreement. The court accepted defendant's guilty plea on the same date. The written sentencing order did not specify that

defendant's sentence would be served concurrently with any sentence for the Wisconsin parole violation. Additional details of what transpired on March 17, 2004, will be supplied below.

¶ 3 Defendant did not move to withdraw his plea and did not pursue a direct appeal. On February 14, 2011, defendant filed his postconviction petition, which consisted largely of excerpts from the transcript of the March 17, 2004, hearing. Defendant claimed that he was deprived of the effective assistance of counsel because of Light's "failure to familiarize himself with the facts and laws relevant to concurrent sentence concerning Wisconsin's conviction." According to the petition, Light's performance was "so ineffective that [defendant's] guilty plea was not knowing and voluntarily entered." Defendant requested that his conviction be vacated; he did not seek modification of the judgment to reflect the agreement that his Illinois and Wisconsin sentences would be served concurrently.[1]

¶ 4 When a defendant who has been sentenced to imprisonment files a petition under the Act, the trial court must examine the petition within 90 days; if the trial court finds that the petition is "frivolous or is patently without merit," it will be summarily dismissed. 725 ILCS 5/122-2.1(a)(2) (West 2010). Summary dismissal is proper if the petition "is based on an indisputably meritless legal theory or a fanciful factual allegation." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). As the *Hodges*

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[1]The State claims that the affidavit attached to the petition was improperly executed per *People v. Carr*, 407 Ill.App.3d 513 (2011), and *People v. McCoy*, 2011 IL 100424. However, in *People v. Turner*, 2012 IL App (2nd) 100819, we determined that "an invalid affidavit is a nonjurisdictional procedural defect that the State must raise or forfeit at the second stage. That same notion, however, compels us to agree with *Henderson* [2011 IL App 1st 090923] and *Terry* [2012 IL App (4th) 100205] that an invalid affidavit is not a basis for a first-stage dismissal." *Id.* ¶ 46.

court pointed out, "[a]n example of an indisputably meritless legal theory is one which is completely contradicted by the record." *Id.* Summary dismissal is reviewed *de novo*. *Id.* at 9.

¶ 5 In support of his argument that he entered his guilty plea under the mistaken belief that his sentences in Illinois and Wisconsin would be concurrent, defendant relies principally on the following colloquy, which occurred immediately after the Rule 402(d)(2) conference:

> "THE COURT: ***
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> Mr. Light indicated that he was going to at the time we do this plea place certain information about his conversations with Wisconsin on the record. I indicated that at that time I was going to explain to you that I certainly don't have a problem with his putting that on the record, but I do want you to understand that should Wisconsin act differently than what Mr. Light indicates he hopes they'll act, that that would not be grounds for withdrawal or for you to take back your plea. So this isn't going to be conditional. Your plea here would not be conditional on whatever Wisconsin does down the road. I'll certainly allow Mr. Light to place his understanding and his conversations on the record so that in the future it might be helpful in Wisconsin. So I want you to understand that. Do you?
>
> [DEFENDANT]: Yes, as long as it's concurrent, Illinois is concurrent.
>
> THE COURT: What I'm telling you is I can't promise you that it will be. Mr. Light can work to try to accomplish that by placing certain things on the record here, by talking to them in Wisconsin, but I can't make you any promises, and neither can the State make those promises.
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> ***

[DEFENDANT]: My understanding is that because I was always sentenced in Wisconsin, Illinois could say we'll run our sentence consecutive to Wisconsin but Wisconsin cannot—

MR. LIGHT: Concur—

[DEFENDANT]: My understanding is Illinois can say we're going through Wisconsin time and we'll put our sentence on back of that. Because I've already been sentenced in Wisconsin, my understanding is that they can't, they can just run it out or ask for me up there first and then come down here. That's why I asked as long as my time down here is concurrent with up there.

THE COURT: We can do our best to place it on the record and say that. If it turns out differently, then that wouldn't be grounds for you to say, you know, I want to take back my plea."

¶ 6 Defendant contends that "[a]lthough the court and [Light] repeatedly tried to clarify the uncertainty of the agreement, the defendant's responses make clear that he misunderstood what he was being told and that he was hearing an assurance which had not been given." This might initially have been the case. When asked whether he understood that his plea "would not be conditional on whatever Wisconsin does down the road," defendant responded, "[y]es, as long as it's concurrent." However, the trial court could not have been more clear in correcting any misunderstanding on defendant's part. The court stated in no uncertain terms that neither the court nor the State could promise that defendant would serve his sentences in Illinois and Wisconsin concurrently.

¶ 7 Defendant further argues that his subsequent remarks in the above colloquy also reflect his ongoing confusion about how the Illinois and Wisconsin sentences would be served. Frankly, we

have no idea what, exactly, defendant was attempting convey with these remarks. In any event, a defendant's mistaken impression about the consequences of his or her plea does not render the plea invalid unless " 'the circumstances existing at the time of the plea, judged by objective standards, justified the mistaken impression.' " *People v. Sharifpour*, 402 Ill. App. 3d 100, 112 (2010) (quoting *People v. Davis*, 145 Ill. 2d 240, 244 (1991)); see also *People v. Smith*, 386 Ill. App. 3d 473, 482 (2008). Given the trial court's clear and unequivocal explanation that there was no guarantee that the Illinois and Wisconsin sentences would be served concurrently, defendant cannot satisfy this standard. Accordingly, the legal theory underlying his claim is indisputably meritless.

¶ 8 For the foregoing reasons, the judgment of the circuit court of Winnebago County is affirmed.

¶ 9 Affirmed.