2017 IL App (2d) 150596-U
No. 2-15-0596
Order filed July 14, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DORIAN LUZAJ, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 10-CF-1167 Honorable Robert G. Kleeman, Judge, Presiding.

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

ORDER

¶ 1 *Held*: The trial court properly summarily dismissed defendant's postconviction petition, which alleged that his guilty plea was induced by ineffective assistance of counsel: a defect in the State's factual basis for the plea did not arguably establish that the State had insufficient evidence of defendant's guilt such that defendant had a plausible defense.

¶ 2 Defendant, Dorian Luzaj, appeals from the first-stage dismissal of his petition under the Post-Conviction Hearing Act (Act) (720 ILCS-5/122-1 *et seq*. (West 2014)) in which he asserted that he had ineffective assistance of counsel when he pled guilty. We conclude that defendant failed to suggest how he might have been prejudiced. We thus affirm.

¶ 3 I. BACKGROUND

¶ 4 A Du Page County grand jury indicted defendant on multiple counts related to cannabis trafficking. A 28-count statewide grand jury indictment (which superseded the Du Page County indictment) charged defendant with money laundering, cannabis trafficking, unlawful delivery of cannabis, unlawful possession of cannabis with intent to deliver, and related conspiracy and attempt offenses. Defendant had retained counsel: first John R. Berg alone, then Berg and Brian Telander, and finally Telander alone after defendant fired Berg.

¶ 5 The State, in its disclosure to defense counsel, noted that electronic surveillance had been used in the case. The State made several discovery disclosures of recordings from multiple law-enforcement agencies.

¶ 6 After what the court described as "a number of 402 conferences," the parties announced that they had reached a plea agreement: defendant would plead guilty to the twenty-fourth of the 28 unnumbered counts, a charge of cannabis trafficking (720 ILCS 550/5.1(a) (West 2010)). The sentencing range was 12 to 60 years' imprisonment, but the agreed sentence was 20 years' imprisonment. The State gave the following factual basis for the count:

> "[O]n or about May 13th, 2010, a police surveillance unit observed several parties unloading, off-loading a truck in Cook County, Illinois.
>
> The people involved in that were [codefendants] Lirim Luzaj[,] the defendant's brother, [and] Bujar Toshkezi. And the truck has never been identified. They unloaded several hockey bags full of what later turned out to be marijuana.
>
> The police later executed a search warrant at 7913 West Sunset Drive, Elmwood Park, Illinois, Cook County. That was on May 20th, 2010. And later found those hockey

bags to be full of a substance containing cannabis. That substance was seized, weighed, and tested, and came out to 5,000 grams of a substance containing cannabis.

If called to testify, *** a qualified forensic scientist, would in fact say so. The source of that cannabis was in fact outside of the State of Illinois.

Later, around May 12th and 20th of 2010, [codefendants] Bujar Toshkezi, Jainish Joseph and Stephanie Ortiz went to Detroit to pick up some cannabis. They were followed by DEA agents and tracked to and from Detroit.

Later, they delivered bags to a house at 6313 Winston Street, Woodridge, DuPage County, Illinois, which *** was the defendant's residence at the time.

The content of the bags that they had brought in from Detroit were later seized and analyzed and came out to over 5,000 grams of a substance containing cannabis.

Again, the source of that cannabis would have been the State of Michigan, and it would have been brought into the defendant's residence on that date. That's it."

The court asked, "So stipulated?" and, after Telander's response of "Yes, sir," ruled that the plea had a proper factual basis.

¶ 7 The court advised defendant that he had the right to make a statement. He did so:

"First of all, when those cannabis [*sic*] came into town, I was in Canada. Those dates he recommended [*sic*], it's on record, it shows I'm in Canada. My passport shows I'm in Canada on those dates.

And second of all, the two drivers he's talking about, they're in custodies [*sic*], and they both getting probation. I don't understand that, your Honor. Those are the ones that traffic it. I didn't force them to cross state lines."

When defendant finished with this, the court asked him if he still wanted to plead guilty. Defendant said that he did. The court ruled that the statement did not negate his acceptance of the agreement: "I'm satisfied he has a right to make those statements, but I do find a factual basis exists." The court dismissed 27 of the 28 counts, entered a conviction on the twenty-fourth, and imposed the agreed sentence. Although defendant filed a *pro se* postsentencing motion, he did not seek to withdraw his plea and did not appeal.

¶ 8 After his withdrawal of another pleading not relevant here, defendant filed a *pro se* petition under the Act in which he claimed that Berg and Telander had been ineffective. In the part of this petition that is the basis for his appeal, he argued that his passport showed that he had been in Canada when his codefendants transported and delivered the bags of cannabis that were the basis for his conviction. Further, he claimed that the State's evidence was insufficient to show that he knew that his codefendants were going to take cannabis from Detroit to Illinois. He argued that these two points gave him a plausible defense, but that counsel had never considered this defense. The petition addressed only the evidence that supported the twenty-fourth count and, in essence, equated the evidence that the State set out in the factual basis with the whole of the evidence that the State had.

¶ 9 Defendant attached his own affidavit to support the petition. He averred that the State was wrong to suggest that he had been the leader of a trafficking organization: "I was never in charge of anything, all I did was [take] orders from Alberto Arevelo who [(with his cousin)] was in charge of everything ***. I just did what I was told." "I kept telling attorney Telander that I wanted an [*sic*] trial because the information that they were trying to convict on was not true and that I was never in charge of anything, that I was only a paw[n]. I admit that I did sale [*sic*] some cann[a]bis in the city, but that I never called any shots over anything nor anyone." Also,

"Attorney Telander kept trying to convince me about the evidence against me instead of beliving [*sic*] me and taking my word. I told him to investigate what I was telling him, but he always had some excuse not to that did not make any since [*sic*] to me." The court dismissed the petition as frivolous and patently without merit after first-stage consideration. Defendant filed a timely notice of appeal.

¶ 10 II. ANALYSIS

¶ 11 In this appeal, defendant argues that he stated the gist of a claim of ineffective assistance of counsel and that the court thus erred when it dismissed his petition as frivolous and patently without merit. The State responds that, among other things, defendant's claim has the fatal flaw of not showing how any action by counsel prejudiced defendant. Specifically, the State argues that defendant failed to suggest that counsel did anything wrong, but even if counsel did, defendant failed to suggest how those things pushed defendant into his guilty plea. It argues that defendant's having been in Canada when his codefendants were transporting the cannabis from Detroit does not give him a defense to cannabis trafficking. That offense does not require that the offender have transported the cannabis, only that he or she caused it to be transported, so the offender's physical participation in transportation is not necessary for him or her to be guilty of trafficking. See 720 ILCS 550/5.1(a) (West 2010). Defendant replies that, read liberally, his petition challenged the sufficiency of *all* the State's evidence. He also claims that he "averred [in his affidavit] that he did not participate in the offenses at all."

¶ 12 We agree with the State that defendant failed to allege facts that support a conclusion that he suffered prejudice from anything that Berg or Telander did. As we now discuss, defendant needed to allege facts suggesting that rejecting the plea agreement would have been rational. He signally failed at that.

¶ 13 When a court gets an initial *pro se* postconviction petition, it must review it (without input from the State or the defendant) under the standard in section 122-2.1(a)(2) of the Act (725 ILCS 5/122-2.1(a)(2) (West 2014)). The section requires the court to dismiss the petition if it is "frivolous or is patently without merit"; this is the Act's "first stage." 725 ILCS 5/122-2.1(a)(2) (West 2014). In *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009), the supreme court explained that the first-stage standard allows a court to dismiss a petition only if it "has no arguable basis either in law or in fact." A defendant does not need to set out any legal theory or support his or her claims with citations to authority. He or she does need to "allege enough facts to make out a claim that is arguably constitutional"; this is enough to meet the requirement that a petition state the "gist" of a claim. *Hodges*, 234 Ill. 2d at 9.

¶ 14 Defendant claimed that Berg and Telander were ineffective. To have properly stated that claim, defendant needed to satisfy both prongs of the ineffective-assistance standard of *Strickland v. Washington*, 466 U.S. 668, 687 (1984). He needed to show both that counsel's performance was deficient and that the deficient performance prejudiced him. *Strickland*, 466 U.S. at 687. Because defendant pled guilty, he could make the showing of deficiency only by showing that counsel "failed to ensure that [he] entered the plea voluntarily and intelligently." *People v. Rissley*, 206 Ill. 2d 403, 457 (2003). He could make the showing of prejudice only by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

> "To establish prejudice in the guilty plea context, 'the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.' [Citations.] A conclusory allegation that a

> defendant would not have pleaded guilty and would have demanded a trial is insufficient to establish prejudice. [Citations.] Rather, *** 'to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.' [Citation.]" *People v. Valdez*, 2016 IL 119860, ¶ 29.

A sufficient claim of prejudice must include "either a claim of innocence or the articulation of a plausible defense that could have been raised at trial." *People v. Hall*, 217 Ill. 2d 324, 335-36 (2005). Our review of a first-stage dismissal is *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶ 15 Defendant has not set out the gist of a basis on which the court could conclude that he could have rationally rejected the plea agreement. Defendant argues that the "evidence failed to show either his connection to the other individuals whom the State alleged were involved in the crime, or that he had 'possession or knowledge of the cannabis that was brought into the State of Illinois.' " He thus concludes that he had "a plausible defense to the charges: that the State's evidence was insufficient to prove [him] guilty beyond a reasonable doubt." But defendant does not suggest a "plausible defense" in the required sense. A bare claim that the State lacked sufficient evidence adds nothing to a conclusory allegation that, with proper representation, one would not have pled guilty. Every defendant who goes to trial without a specific defense hopes, rationally or not, that the State will be unable to meet its burden of proof.

¶ 16 Defendant implies that he has gone beyond the mere claim that the State would not have met its burden of proof: he suggests that he has actually supplied positive evidence that the State could not meet that burden. However, the only positive evidence that he can point to is the factual basis, which he contends is deficient. Here, defendant is trying to transmute a clearly noncognizable claim into a more plausible one by a superficial change. A deficient factual basis

is not an independent basis for postconviction relief: at most, the lack of a proper factual basis may be relevant to whether the defendant entered his plea knowingly. *People v. Weathers,* 83 Ill. App. 3d 451, 453 (1980). We agree that the State did not explain defendant's connection to the cannabis shipment in the factual basis. However, if defendant required more from the State, the time to demand it was when he entered his plea. Defendant tries to equate the strength of the evidence in the factual basis with the strength of all the State's evidence. He cannot logically do that. Not only is the factual basis for a plea conventionally a brief statement, but it need not contain all the evidence necessary for a proper conviction (*People v. Barker*, 83 Ill. 2d 319, 327 (1980)). Defendant's inference is not just logically unsound—worse for him, the record contradicts it. We know that the State disclosed much more evidence than went into the factual basis: the disclosure forms mentioned electronic surveillance and said that defense counsel had several times received multiple data discs.

¶ 17 We further point out that defendant did not claim that he was innocent. In fact, he admitted involvement in cannabis sales, but tried to lessen his culpability by claiming that he was taking orders from "Arevelo," who he implied was the person actually in charge of the cannabis-trafficking organization. Although he claimed to be a "paw[n]," and not a person who "called [the] shots," he did not deny a role in the trafficking operation that ended with his arrest. Most important, he never denied causing the transport of the cannabis from Detroit to Illinois, which was something he would not have had to "call [the] shots" to do—he could have done that as a lieutenant or even just a messenger. His affidavit was thus more an admission than it was a supporting document, so it very efficiently undermined his already weak attempt to show prejudice.

¶ 18 III. CONCLUSION

¶ 19 For the reasons stated, we affirm the petition's dismissal. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 20 Affirmed.