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2011 IL App (3d) 090843-U

Order filed November 8, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT
A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 10th Judicial Circuit,
Plaintiff-Appellee,)	Peoria County, Illinois.
)	
)	Appeal No. 3-09-0843
v.)	Circuit No. 07-CF-857
)	
FREDERICK L. HODGES,)	Honorable
)	James E. Shadid,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice Carter and Justice Schmidt concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant's postconviction petition was properly dismissed during the first stage of postconviction proceedings because the petition did not include any "affidavits, records, or other evidence" supporting the defendant's claims or explain why such supporting evidence was unavailable.
- ¶ 2 The defendant, Frederick Hodges, pleaded guilty to two counts of unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(a)(7.5)(A)(ii), (c)(2) (West 2006)). Pursuant to a plea agreement, the defendant was convicted and sentenced to two concurrent terms of 11 years' imprisonment. The defendant later filed a *pro se* petition for

postconviction relief in which he claimed that his trial counsel provided ineffective assistance of counsel by failing to inform him before he pled guilty that the State had made a prior plea offer of eight years in prison. The defendant alleged that he would have accepted this offer had he known of it before he entered his plea. The circuit court found that the defendant's petition was frivolous and without merit and summarily dismissed the petition during the first stage of postconviction proceedings. The defendant appeals the circuit court's summary dismissal of his postconviction petition and asks us to remand the matter for additional proceedings.

¶ 3

BACKGROUND

¶ 4 The defendant was charged by indictment with possession with intent to deliver "Ecstasy" (a Class X felony), simple possession of Ecstasy, possession with intent to deliver cocaine (a Class 1 felony), and simple possession of cocaine. After conducting hearings on the defendant's motions to suppress evidence and to quash certain search warrants, the court denied the defendant's motions and set the case for trial.

¶ 5 Approximately two and a half months before trial, the circuit court held a Rule 402 conference. During that conference, the circuit court stated that, if the defendant agreed to plead guilty at that time, the court would recommend that the State request a sentence of 9 ½ years in prison. The court also stated that it would impose that sentence if the State accepted the court's recommendation. The defendant indicated that he would not agree to plead guilty in exchange for a sentence of 9 ½ years. Ten days prior to trial, the State offered the defendant a plea deal of 10 years in prison in exchange for a guilty plea. The defendant rejected the State's offer.

¶ 6 On the first day of trial, prior to jury selection, the defendant's counsel informed the circuit court that the defendant would plead guilty and accept the court's "offer" of nine 9 ½

years in prison if that offer was still available. In response, the court stated that it could participate in the plea negotiation process only if the court and the parties agreed to conduct another Rule 402 conference. The court noted that it would not consider conducting another Rule 402 conference because it had already conducted one. Nevertheless, defendant's counsel formally requested another Rule 402 conference. The prosecutor stated that the State would not agree to another conference, and the court noted that Supreme Court Rule 402 "requires the State's approval to have a 402 conference." Accordingly, the court rejected the defendant's request.

¶ 7 Shortly thereafter, the defendant agreed to plead guilty to Counts 1 and 3 of the indictment (possession with intent to deliver ecstasy and cocaine, respectively) in exchange for two concurrent sentences of 11 years in prison and the dismissal of the simple possession charges. The circuit court admonished the defendant regarding the nature of the charges against him, his right to a jury or bench trial, and the possible sentences he could receive upon conviction.¹ The State then presented a factual basis for the defendant's pleas. After discerning some hesitation on the defendant's part, the circuit court called the potential jurors into the courtroom to begin jury selection. Shortly thereafter, however, the defendant decided to accept the deal and plead guilty. The court again reviewed the possible sentences and admonished the defendant of his rights. The defendant stated that he was not being forced to plead guilty and that no one had made any promises to him other than what was said in open court. Although the

¹ The circuit court told the defendant that Count 1 carried a sentence of 6 to 30 years in prison with 3 years of mandatory supervised release and that Count 3 carried a sentence of 4 to 15 years with 2 years of mandatory supervised release.

defendant initially asked the court whether he could be "resentenced" "under the Class 1" and whether he could plead guilty to the simple possession charges rather than the more serious charges of possession with intent to deliver, the circuit court made it clear that plea negotiations were over and that the defendant's only choice was either to accept the plea offer that was "on the table" or proceed to trial. The defendant elected to accept the State's offer and plead guilty. The court accepted the defendant's plea, imposed the agreed-upon concurrent sentences of 11 years' imprisonment, and ordered the defendant to pay various costs, fees, and assessments.

¶ 8 The defendant did not file a motion to withdraw his guilty plea. However, within 30 days of his plea, he filed a timely postconviction petition. A few days after filing the petition, the defendant sought leave to dismiss the petition, which the court granted.

¶ 9 Approximately 10 months later, the defendant filed a new postconviction petition. Although the petition raised several claims, only one is at issue in this appeal. Specifically, the defendant alleged that his trial counsel was ineffective because he failed to inform the defendant of a plea offer which the defendant would have accepted if he had known about it. The defendant alleged that Assistant State's Attorney Larry Evers "made an offer of 8 years in prison" but that this offer "was not told to the defendant until after the plea of 11 years was entered in this case and the proceedings were over[.]" The defendant claimed that, when his counsel belatedly informed him of the 8-year offer, he told the defendant that he did not disclose the offer sooner because he did not believe that the defendant would have accepted it. The defendant alleged that he would have taken the offer if it had been disclosed to him in a timely fashion. The defendant's petition was verified and supported by a sworn affidavit signed by the defendant which stated that the facts stated in the petition were "true and correct in substance

and in fact." The defendant also attached various documents to his petition, including a copy of a letter that his counsel had sent to the Attorney Registration and Disciplinary Commission responding to a complaint that the defendant had filed against him. The letter discussed the defendant's rejection of plea offers of 9 ½ and ten years. However, it did not reference a plea offer of 8 years.

¶ 10 The circuit court found that the allegations in the defendant's postconviction petition were "frivolous, without merit, and not supported by the record." Accordingly, the court summarily dismissed the petition without requiring a response from the State or holding an evidentiary hearing. This appeal followed.

¶ 11 ANALYSIS

¶ 12 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 through 122-7 (West 2006)) enables a defendant to challenge his conviction or sentence for violations of federal or state constitutional rights. *People v. Tenner*, 175 Ill. 2d 372, 377 (1997). To be entitled to postconviction relief, a defendant must establish a substantial deprivation of federal or state constitutional rights in the proceedings that produced the judgment being challenged. *Id.* at 378. A postconviction petition must be both verified by affidavit (725 ILCS 5/122-1(b) (West 2006)), and supported by "affidavits, records, or other evidence" (725 ILCS 5/122-2 (West 2006)). *People v. Collins*, 202 Ill. 2d 59, 65 (2002). If such "affidavits, records, or other evidence" are unavailable, the petition must explain why. 725 ILCS 5/122-2 (West 2006); *Collins*, 202 Ill. 2d at 65.

¶ 13 Except in cases where the death penalty has been imposed, proceedings under the Act are divided into three distinct stages. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). At the first

stage, the trial court has 90 days to examine the petition independently and determine whether, on its face, “the petition is frivolous or is patently without merit.” 725 ILCS 5/122-2.1(a)(2) (West 2006); *Gaultney*, 174 Ill. 2d at 418. If the circuit court determines that the petition is either frivolous or patently without merit, it “shall dismiss the petition” summarily. 725 ILCS 5/122-2.1(a)(2) (West 2006). A postconviction petition is considered frivolous or patently without merit if the petition's allegations, taken as true, fail to present the “gist” of a meritorious constitutional claim. *Collins*, 202 Ill. 2d at 66; *Gaultney*, 174 Ill. 2d at 418. Moreover, the failure to either attach the necessary “affidavits, records, or other evidence” or explain their absence is “fatal to a post-conviction petition *** and by itself justifies the petition's summary dismissal.” (Citations and internal quotation marks omitted.) *Collins*, 202 Ill. 2d at 66. We review a circuit court’s summary dismissal of a postconviction petition at the first stage *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009).

¶ 14 In this case, the circuit court's summary dismissal of the defendant's petition was proper because the defendant failed to support his allegations with “affidavits, records, or other evidence” or explain why such affidavits, records, or other evidence were unavailable, as required by section 5/122-2 of the Act. The defendant's petition alleged that Assistant State's Attorney Evers offered eight years in prison in exchange for a guilty plea. However, the only affidavit that the defendant submitted in support of this allegation was his own. As our supreme court has made clear, that is insufficient. *Collins*, 202 Ill. 2d at 66-68. The purpose of requiring a defendant to support his postconviction petition with “affidavits, records, or other evidence” is to show that the verified allegations contained in the petition are “capable of objective or independent corroboration.” *Collins*, 202 Ill. 2d at 67. A defendant cannot make that showing

merely by signing and submitting an affidavit swearing that the allegations contained in the petition are true. *Id.* To hold otherwise would be to erroneously conflate the *verification* requirement of section 5/122-1(b) with the *corroboration* requirement of section 5/122-2. See *Collins*, 202 Ill. 2d at 67. As our supreme court has noted, equating these two requirements would “confuse the purposes of subjective verification and independent corroboration” and would “render the ‘affidavits, records, or other evidence’ requirement of section 122-2 meaningless surplusage.” *Id.*

¶ 15 In addition, the defendant did not submit any other documentation or point to any record evidence supporting his allegation that the State offered him a plea deal of eight years in prison.² Nor did he explain why he was unable to submit any evidence in support of his claim. These omissions were “fatal” to his postconviction petition. *Collins*, 202 Ill. 2d at 66. Accordingly, the circuit court was justified in summarily dismissing the petition during the first stage of postconviction proceedings. *Id.*

¶ 16 As the defendant correctly notes, the failure to attach independent corroborating documentation or explain its absence may be excused when the petition contains facts from which it can be easily inferred that “the only affidavit the defendant could have furnished, other than his own sworn statement, was that of his attorney.” *People v. Hall*, 217 Ill. 2d 324, 333

² There does not appear to be any evidence in the record supporting the defendant’s claim that the State made an offer of eight years imprisonment. Thus, this is not a case where corroborating affidavits are unnecessary because “the record, the contents of the court file and the exhibits allow for objective and independent corroboration of the allegations.” *People v. Hanks*, 335 Ill. App. 3d 894, 899 (2002).

(2005); see also *Collins*, 202 Ill. 2d at 68. Thus, where a defendant claims that he pleaded guilty based on the misrepresentations or erroneous legal advice of his counsel, the defendant need not present any affidavits other than his own affidavit to prove what his attorney told him before he entered his plea. See, e.g., *Hall*, 217 Ill. 2d at 333; *People v. Ramirez*, 402 Ill. App. 3d 638, 641-42 (2010); *People v. Rogers*, 372 Ill. App. 3d 859, 865 (2007); *People v. Kellerman*, 342 Ill. App. 3d 1019, 1026 (2003). Accordingly, in this case, the defendant was not required to submit an affidavit other than his own to corroborate his allegations regarding what his counsel told him before or after the plea was entered. However, unlike the cases cited above, the defendant's claim in this case did not depend solely on communications between the defendant and his attorney. To prevail, the defendant had to prove that the State actually made an offer of eight years' imprisonment and communicated that offer to the defendant's counsel before the plea was entered. In principle, the defendant could have substantiated these allegations by submitting an affidavit from Assistant States Attorney Evers (who the defendant claimed had communicated the offer to the defendant's counsel) or from someone else at the State's Attorney's office who was familiar with the alleged offer. However, the defendant submitted no such affidavit. Nor did he explain why he was unable to obtain such an affidavit.

¶ 17 On appeal, the defendant argues that it is unlikely that anyone at the State's Attorney's office would have agreed to submit an affidavit on the defendant's behalf. Even if that were true, however, the defendant was still required to *try* to obtain such an affidavit. If the State's Attorney's office refused his request or failed to respond, the defendant could have informed the circuit court of this fact, thereby explaining why a corroborating affidavit was unavailable. However, the defendant did not try to obtain a corroborating affidavit or attempt to explain why

he was unable to do so. Thus, the defendant failed to comply with the requirements of section 5/122-2.

¶ 18 In sum, because a critical allegation in the defendant's petition was capable of being independently corroborated by someone other than the defendant's counsel, section 5/122-2 required the defendant to try to obtain such corroboration and to either submit a corroborating affidavit or explain its unavailability. See *Rogers*, 372 Ill. App. 3d at 863 (ruling that defendant who raised a postconviction claim of ineffective assistance of counsel and deprivation of due process in connection with her guilty plea was required to submit a corroborating affidavit or explain its absence where the defendant's claim "did not depend solely on communications between her and her attorney" and where a "central allegation" of her petition could have been corroborated by a witness named in the petition). The fact that the defendant could not provide independent corroboration of what his attorney allegedly told him does not change this analysis. See *id.* at 865 (ruling that the fact that a defendant is unable to substantiate some of the allegations of his petition "does not excuse [him] from attaching affidavits, records, or other evidence supporting other principal allegations of the petition" that are capable of independent corroboration).

¶ 19 The defendant argues that we should not affirm the circuit court's summary dismissal of his petition based upon his failure to submit corroborating affidavits because the trial court did not dismiss his petition on that basis. The defendant maintains that, if the trial court had found the defendant's supporting documentation insufficient, it could have given him an opportunity to file additional affidavits or other evidence before dismissing the petition. We disagree. "We review the trial court's judgment, not its rationale." *People v. Reed*, 361 Ill. App. 3d 995, 1000

(2005). Accordingly, we “can sustain the decision of a lower court on any grounds which are called for by the record, regardless of whether the lower court relied on those grounds and regardless of whether the lower court's reasoning was correct”). *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 97 (1995). Here, the record reveals that the defendant’s petition was fatally insufficient because it failed to comply with the mandatory pleading and evidentiary requirements prescribed by section 5/122-2 of the Act. The circuit court could have dismissed the petition summarily on that basis, and it was not required to give the defendant an opportunity to submit additional affidavits before dismissing the petition. By arguing for reversal, the defendant is essentially asking to be excused from the pleading and evidentiary requirements of section 5/122-2. See *Collins*, 202 Ill. 2d at 68. As our supreme court has held, “[n]othing in the Act authorizes such a comprehensive departure.” *Id.*

¶ 20

CONCLUSION

¶ 21 Because the defendant's postconviction petition did not include “affidavits, records, or other evidence” supporting his claims or an explanation as to why such supporting evidence was lacking, the petition was frivolous and patently without merit. We therefore affirm the judgment of the circuit court of Peoria County which summarily dismissed the petition.

¶ 22 Affirmed.