2013 IL App (4th) 120374-U

NO. 4-12-0374

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
January 31, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
JAMES E. PEAT,	)	No. 10CF1780
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Appleton and Turner concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court did not err in dismissing defendant's *pro se* postconviction petition where he failed to attach the necessary affidavits.

(2) Defendant is entitled to credit against his $5 drug-court program fine.

(3) Defendant's violent-crime-victim-assistance assessment is reduced to $4.

¶ 2 Following a January 2011 bench trial, defendant, James E. Peat, was convicted of aggravated battery and resisting a peace officer. In March 2011, the trial court sentenced him to concurrent prison terms of six and three years respectively. In March 2012, defendant filed a *pro se* postconviction petition, which the court dismissed as frivolous and patently without merit.

¶ 3 Defendant appeals, arguing (1) the trial court erred in its summary dismissal of his postconviction petition where he was provided ineffective assistance of counsel, (2) he is entitled to monetary credit against his $5 drug-court program assessment, and (3) his

violent-crime-victim-assistance (VCVA) assessment should be reduced to $4. We affirm as modified and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 On October 21, 2010, the State charged defendant with attempt (disarming a peace officer) (720 ILCS 5/5/31-1a(b) (West 2010)), aggravated battery (720 ILCS 5/12-4(b)(18) (West 2010)), and resisting a peace officer (720 ILCS 5/31-1(a-7) (West 2010)).

¶ 6 During defendant's January 18, 2011, bench trial, Matthew Rivers, a City of Urbana police officer, testified he was on duty on October 21, 2010, standing outside the Canopy Club bar shortly after 2 a.m. when he observed defendant and another man fighting across the street. When he crossed the street, the two men had fallen to the ground and defendant was straddling the other man. Rivers approached defendant from behind and identified himself as a police officer. Defendant continued to punch the other man, and Rivers sprayed defendant with pepper spray. Rivers grabbed defendant's arm when defendant did not stop fighting. However, defendant pulled away from Rivers.

¶ 7 At that point, defendant turned around, looked at Rivers, lunged at his legs, and tackled Rivers to the ground. Rivers testified he was wearing his police uniform and the area was well lit. According to Rivers, a struggle lasting approximately 30 seconds ensued. During the altercation, Rivers felt defendant's "arm or his hand" on Rivers's weapon holster, which contained his duty weapon. Defendant "either grabbed it or yanked it." However, Rivers was able to kick defendant away. Defendant then ran and Rivers chased him, yelling "stop, police." Rivers tackled defendant and arrested him. When asked, Rivers explained, "[w]hether or not [defendant] was trying to take the weapon or not, I can't say. His hands were there. I felt the tug

on the holster. That's the best I can describe it." Rivers testified he suffered minor injuries as a result of the altercation with defendant.

¶ 8 Defendant testified he was standing in the parking lot across the street from the Canopy Club "waiting on some friends to come out to the club to drive 'em home." According to defendant's testimony he was wearing his "Champaign Legion" security shirt because he "was going to ask them for a job that night." Defendant testified a man approached him and was angry at defendant because he thought defendant had him thrown out of the club. Defendant testified the man had "a shiny pistol" so defendant grabbed the man, "slammed him to the ground," and "started punching him." Defendant testified he was punching the man when he was tackled from behind. Defendant testified he was blind in his right eye and did not know Rivers was a police officer until he was pepper sprayed. Defendant testified he never attempted to take Rivers's weapon. Defendant did not tell Rivers he thought the other man was armed.

¶ 9 At the conclusion of the hearing, the trial court found defendant not guilty of attempt (disarming a police officer) but guilty of aggravated battery and resisting a peace officer.

¶ 10 On March 21, 2011, the trial court sentenced defendant as stated.

¶ 11 On March 25, 2011, defendant filed *pro se* "petition to appeal" as well as a copy of a letter addressed to defendant's trial counsel asking counsel to file a motion to vacate judgment or reconsider sentence. The March 29, 2011, docket entry indicates the trial court construed defendant's petition as a motion to reconsider and set the matter for an April 25, 2011, hearing.

¶ 12 On April 13, 2011, defendant filed a notice of appeal, arguing, *inter alia*, he was provided ineffective assistance of counsel where his trial counsel did not properly file motions or locate a witness who could have proved his innocence.

¶ 13 At the April 25, 2011, hearing on defendant's motion to reconsider sentence, defendant's counsel stated defendant wished to withdraw his motion to reconsider sentence and instead proceed with his appeal. The trial court granted defendant's motion to withdraw and appointed the office of the State Appellate Defender to represent defendant. Thereafter, an amended notice of appeal was filed.

¶ 14 On March 13, 2012, defendant filed a motion in this court to voluntarily dismiss his appeal, which we granted on March 14, 2012. *People v. Peat*, No. 4-11-0318 (March 14, 2012) (granting defendant's motion to dismiss his appeal).

¶ 15 On March 16, 2012, defendant filed a postconviction petition, alleging, *inter alia*, his trial counsel provided him with ineffective assistance where counsel (1) failed to interview a witness defendant identified as Tony Brock and (2) failed to subpoena a "parking lot surveillance camera that would have footage that completely contradicts [Rivers's] trial testimony." According to defendant's petition, a local attorney, Tony Novak, told him about the surveillance camera and had used the video as evidence in a prior criminal case.

¶ 16 On March 23, 2012, the trial court dismissed defendant's postconviction petition as frivolous and patently without merit.

¶ 17 This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 On appeal, defendant argues (1) the trial court erred in its summary dismissal of his postconviction petition where he was provided ineffective assistance of counsel, (2) he is entitled to monetary credit against his $5 drug-court program assessment, and (3) his VCVA assessment should be reduced to $4.

¶ 20 A. Waiver

¶ 21 We initially note the trial court dismissed defendant's postconviction petition on the basis defendant waived, *inter alia*, his ineffective-assistance-of-counsel claim because he voluntarily dismissed his appeal. Specifically, the court found the following:

> "On April 13, 2011, the Defendant filed a notice of appeal and attached thereto a list of potential errors including ineffective assistance of counsel. The Appellate Defender was appointed and the record was prepared and submitted by the Circuit Clerk. On March 15, 2012[,] the Defendant, appellant moved to dismiss his appeal. Unlike the issue in *People v. Brooks*, 371 Ill. App. 3d 482, this Defendant actually filed a notice of appeal with his attached list of grievances and then dismissed the appeal. The Defendant was given an opportunity to have his claim of errors decided by the Appellate Court. As to the record that now stands, the Defendant has waived his contentions of error.
>
> Therefore, the Defendant's petition is frivolous, patently without merit[,] and is ordered dismissed."

¶ 22 Generally, issues which could have been raised on direct appeal, but were not, are waived. *People v. Ward*, 187 Ill. 2d 249, 257, 718 N.E.2d 117, 124 (1999). However, "when a defendant never appeals, the rule that a defendant cannot raise any issue in a postconviction petition that he or she could have made on direct appeal is inapplicable." *People v. Brooks*, 371 Ill. App. 3d 482, 486, 867 N.E.2d 1072, 1075 (2007).

¶ 23 In this case, defendant filed a notice of appeal but did not pursue the appeal to resolution by the appellate court. Instead, defendant voluntarily dismissed his direct appeal and then included his ineffective-assistance claim in his postconviction petition. Claims of ineffective assistance of counsel may be raised in a postconviction petition. See *People v. Brown*, 236 Ill. 2d 175, 185, 923 N.E.2d 748, 754 (2010) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). In fact, this court has frequently found ineffective assistance claims are better suited for postconviction proceedings where evidence beyond the scope of the record may be presented. See, *e.g.*, *People v. Coleman*, 391 Ill. App. 3d 963, 965, 909 N.E.2d 952, 956 (2009).

¶ 24 Moreover, defendant's ineffective-assistance claim in this case is based on what his trial counsel should have done and not what his counsel did. [" 'A] claim based on what ought to have been done may depend on proof of matters which could not have been included in the record precisely because of the allegedly deficient representation.' " *People v. Tate*, 2012 IL 112214, ¶ 14 (quoting *People v. Erickson*, 161 Ill. 2d 82, 88, 641 N.E.2d 455, 459 (1994)). In such an instance, " 'default may not preclude an ineffective-assistance claim for what trial counsel allegedly ought to have done in presenting a defense.' " *Tate*, 2012 IL 112214, ¶ 14 (quoting *People v. West*, 187 Ill. 2d 418, 427, 719 N.E.2d 664, 670 (1999)).

¶ 25 Thus, the trial court erred in finding defendant waived his ineffective-assistance-of-counsel claim by voluntarily dismissing his direct appeal. See *People v. Rose*, 43 Ill. 2d 273, 279, 253 N.E.2d 456, 461 (1969); *Brooks*, 371 Ill. App. 3d at 486, 486 N.E.2d at 1075; *People v. Culp*, 127 Ill. App. 3d 916, 920, 468 N.E.2d 1328, 1330-31 (1984). Our disagreement notwithstanding, however, we may affirm the dismissal of a postconviction petition on any basis contained in the record. See *People v. Patton*, 315 Ill. App. 3d 968, 972, 735 N.E.2d 185, 189

(2000) (a reviewing court may affirm the dismissal of a postconviction petition on any basis contained in the record, even if the trial court did not rely on those grounds). With this in mind, we now turn to the merits of defendant's postconviction petition.

¶ 26 B. Ineffective-Assistance Claim

¶ 27 Defendant argues his trial counsel provided ineffective assistance of counsel. Specifically, defendant contends he was prejudiced by his trial counsel's failure to (1) interview a witness and (2) subpoena surveillance camera footage. We disagree.

¶ 28 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2010)) establishes a three-stage process for adjudicating a postconviction petition. *People v. Beaman*, 229 Ill. 2d 56, 71, 890 N.E.2d 500, 509 (2008). Here, defendant's petition was dismissed at the first stage. At the first stage, the trial court must review the postconviction petition and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010). "[A] *pro se* petition seeking postconviction relief under the Act for a denial of constitutional rights may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 11-12, 912 N.E.2d 1204, 1209 (2009). Our review of the first-stage dismissal of a postconviction petition is *de novo*. *People v. Ligon*, 239 Ill. 2d 94, 104, 940 N.E.2d 1067, 1074 (2010).

¶ 29 In this case, defendant argues his trial counsel was ineffective for failing to interview Tony Brock, the man defendant was fighting with when Rivers intervened. Defendant infers Brock may have been able to provide "evidence which might have tipped the court's credibility determination" regarding whether defendant initially knew Rivers was a police officer.

However, defendant failed to attach an affidavit to his postconviction petition supporting his claim. Generally, "the failure to either attach the necessary affidavits, records, or other evidence or explain their absence is fatal to a post-conviction petition [citation] and by itself justifies the petition's summary dismissal." (Internal quotation marks omitted.) *People v. Delton*, 227 Ill. 2d 247, 255, 882 N.E.2d 516, 520 (2008).

¶ 30 We note defendant argues in his reply brief he did not seek an affidavit from Brock because "[t]rying to obtain an affidavit from Brock would have been *** futile, given that the incident arose while the defendant was getting the better of Brock in a fistfight[,] which Brock had precipitated." That line of reasoning, however, raises serious questions regarding whether Brock would have cooperated with any investigation, or whether Brock's statements or testimony would have been at all favorable to defendant.

¶ 31 Regardless, absent such an affidavit, it cannot be determined what, if any, favorable information Brock could have provided. Likewise, while defendant maintains attorney Novak told him a surveillance camera overlooked the area and Novak previously used the surveillance video as defense evidence in another case, defendant did not attach, or otherwise explain the absence of, an affidavit from Novak regarding that conversation. Such failures are fatal to defendant's postconviction petition.

¶ 32 C. Presentence-Detention Credit

¶ 33 Defendant next argues he is entitled to monetary credit against his $5 drug-court program assessment for time spent in presentence custody. We note a claim for monetary credit under section 110-14 of the Code of Criminal Procedure of 1963 (Procedure Code) (725 ILCS 5/110-14 (West 2010)) may be raised at any time, even on appeal in a postconviction proceeding.

People v. Caballero, 228 Ill. 2d 79, 88, 885 N.E.2d 1044, 1049 (2008). The State concedes defendant is entitled to a credit for time spent in pretrial custody which may be applied to any fines assessed against him. We accept the State's concession.

¶ 34 Section 110-14(a) of the Procedure Code states, "[a]ny person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of $5 for each day so incarcerated upon application of the defendant." 725 ILCS 5/110-14(a) (West 2010). We note such credit may only be applied to offset eligible fines, not fees. *People v. Jones*, 223 Ill. 2d 569, 580, 861 N.E.2d 967, 974 (2006). This court has previously found drug court assessments are fines where, as here, the defendant has not been prosecuted in drug court. See *People v. Jake*, 2011 IL App (4th) 090779, ¶ 29, 960 N.E.2d 45.

¶ 35 In this case, the trial court awarded defendant $755 "towards any fines that might be imposed" for the 151 days he spent in presentence custody. See 725 ILCS 5/110-14 (West 2010). However, the written sentencing judgment contained in the record on appeal does not show defendant received any credit for time spent in presentence custody. Defendant is entitled to apply his monetary credit toward his $5 drug-court program fine. We remand for issuance of an amended sentencing judgment reflecting this credit.

¶ 36 D. Violent-Crime-Victim-Assistance Assessment

¶ 37 Finally, defendant argues the $20 VCVA assessment should be reduced to $4 because his $5 drug-court program fine was less than $40. The State concedes a reduction to $4 is necessary. We agree.

¶ 38 Section 10(c)(1) of the Violent Crime Victims Assistance Act (725 ILCS 240/10(b)

(West 2010)) provides where other fines are imposed, the penalty assessed against a defendant equals "$4 for each $40, or fraction thereof, of fine imposed." 725 ILCS 240/10(b) (West 2010). We note this fine is *not* creditable based on time served. 725 ILCS 240/10(b) (West 2010).

¶ 39 In this case, defendant was assessed $5 in fines. As such, the VCVA assessment should be set at $4. See 725 ILCS 240/10(b) (West 2010). Thus, we remand for issuance of an amended sentencing judgment so reflecting.

¶ 40 III. CONCLUSION

¶ 41 For the reasons stated, we affirm the trial court's dismissal of defendant's postconviction petition but remand with directions for issuance of an amended written sentencing judgment reflecting (1) an available credit of $755 to be applied toward defendant's $5 drug-court program assessment, and (2) a reduction of the VCVA assessment to $4. Because the State successfully defended a portion of this appeal, we award the State its $50 statutory assessment against defendant as costs of this appeal. See *People v. Smith*, 133 Ill. App. 3d 613, 620, 479 N.E.2d 328, 333 (1985) (citing *People v. Nicholls*, 71 Ill. 2d 166, 178, 374 N.E.2d 194, 199 (1978)).

¶ 42 Affirmed as modified; cause remanded with directions.