2013 IL App (4th) 120606-U

NO. 4-12-0606

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
November 7, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
JIMMY L. TILLEY, JR.,	)	No. 09CF39
Defendant-Appellant.	)	
	)	Honorable
	)	Jennifer H. Bauknecht,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Steigmann and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: Where defendant's *pro se* postconviction petition raised an arguably meritorious claim of ineffective assistance of counsel, the trial court erred in summarily dismissing the petition.

¶ 2 In November 2009, the trial court found defendant, Jimmy L. Tilley, Jr., guilty of unlawful participation in methamphetamine production. In December 2009, the court sentenced him to 24 years in prison and ordered him to pay various fines, fees, and assessments. In April 2012, defendant filed a *pro se* postconviction petition, which the court summarily dismissed as frivolous and patently without merit.

¶ 3 On appeal, defendant argues the trial court erred in summarily dismissing his postconviction petition. We reverse and remand for further proceedings.

¶ 4 I. BACKGROUND

¶ 5 In February 2009, the State charged defendant by information with one count of unlawful participation in methamphetamine production (720 ILCS 646/15(a)(2)(C) (West 2008)), alleging he knowingly participated in the manufacture of 100 grams or more but less than 400 grams of a substance containing methamphetamine. The State also filed a similar charge against defendant's wife, Tina Tilley. Defendant pleaded not guilty.

¶ 6 In August 2009, defendant and his wife were tried jointly in a bench trial. Pontiac police inspector Mike Willis testified he received information from a confidential source in February 2009 that methamphetamine was being produced at 322 South Franklin in Dwight. Defendant lived at the home with his wife and children.

¶ 7 Dwight police inspector Mike Nolan testified defendant gave his consent to search the residence. Defendant stated during an interview that he had been cooking methamphetamine for a couple of months and did the cooking in the garage.

¶ 8 Illinois State Police Investigator Edward Woods testified he responded to defendant's residence. He stated the smell of a methamphetamine lab was "very overwhelming." Woods interviewed Tina, and she stated defendant's brother and sister taught him how to manufacture methamphetamine in March 2008. Later that year, Tina found different-sized lids, hoses, and methamphetamine materials that led her to believe defendant was manufacturing methamphetamine. She also stated she knew the pseudoephedrine pills she purchased were to be used in manufacturing methamphetamine.

¶ 9 Matt McCormick, a member of the Methamphetamine Response Team with the Illinois State Police, testified he conducted an interview with defendant inside the residence. Defendant stated he learned to manufacture methamphetamine in 2008 from his brother and

sister. Defendant cooked the methamphetamine in his garage and some of the leftover material was kept in the master bedroom. Defendant stated he normally used three to five boxes of pseudoephedrine, and his normal yield was a quarter gram of methamphetamine. Defendant used pseudoephedrine pills, lithium batteries, sulfuric acid, lye, ammonium nitrate, and coffee filters. Defendant gave a handwritten statement inculpating himself in the offense.

¶ 10 After the trial was continued until November 2009, Illinois State Police special agent Courtney Mauser testified to finding a black garbage bag in the master bedroom that contained a white and black substance that tested positive for methamphetamine. The total weight of the powdery substance was 391.1 grams.

¶ 11 Illinois State Police master sergeant Greg Lindemulder testified defendant consented to a search of the residence. Defendant stated he had remnants of a lab in his bedroom and pointed out a black garbage bag. He stated he had cooked methamphetamine in the bedroom the night before.

¶ 12 Defendant did not testify. Following closing arguments, the trial court found him guilty. Thereafter, defendant filed a motion for a new trial, which the court denied.

¶ 13 In December 2009, the trial court conducted the sentencing hearing. Defense counsel indicated defendant's mitigation evidence included a letter from his pastor. Counsel also argued defendant's drug addiction was a mitigating factor and the amount of methamphetamine at issue was for his personal use. The court found no mitigating factors. As to evidence in aggravation, the court noted defendant's conduct caused or threatened serious harm, he had a history of criminal activity, and a sentence was necessary to deter others from committing the same crime. The court sentenced defendant to 24 years in prison. Pursuant to statute (730 ILCS

5/3-6-3(a)(2)(v) (West 2008)), defendant was required to serve 75% of his sentence, which was to run consecutive to his sentence in case No. 08-CF-143. The court ordered defendant to pay a $3,000 drug assessment, a $100 trauma center fee, a $5 spinal cord fee, and a $100 lab fee. The court also ordered defendant to pay the violent crimes victim's assistance fund fine but did not set the amount. The court indicated defendant was entitled to receive credit for time spent in custody from February 6, 2009, to December 29, 2009.

¶ 14 In July 2010, the trial court denied defendant's motion to reconsider sentence. Defendant appealed, arguing he was entitled to $1,630 in presentence credit against his drug assessment based on his 326 days in presentence custody. This court affirmed as modified and remanded the cause for the trial court to amend the sentencing judgment to reflect the credit. *People v. Tilley*, No. 4-10-0586 (Jan. 27, 2012) (unpublished summary order under Illinois Supreme Court Rule 23(c)(2)).

¶ 15 In April 2012, defendant filed a *pro se* petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2012)). Defendant alleged, in part, that (1) trial counsel was ineffective for failing to argue his 24-year sentence was unconstitutionally disproportionate to the severity of the offense; (2) counsel was ineffective for failing to contact Dr. Swink and use Dr. Swink's affidavit and an affidavit from a local pharmacist as evidence in mitigation that defendant had a drug addiction and sought treatment; and (3) appellate counsel was ineffective for not raising these arguments on direct appeal. Defendant also stated he did not attach the affidavits to his petition because he gave them to counsel and he did not have access to counsel's file.

¶ 16 In June 2012, the trial court summarily dismissed defendant's petition, finding it

frivolous and patently without merit. The court found defendant "failed to show that either trial counsel['s] or appellate counsel's performance fell below an objective standard of reasonableness." This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 On appeal, defendant argues his case should be remanded for second-stage postconviction proceedings because he stated the gist of a constitutional claim that trial counsel was ineffective for failing to present mitigating evidence at sentencing and appellate counsel was ineffective for failing to challenge his 24-year sentence as excessive. The State concedes defendant's postconviction petition raised an arguably meritorious claim of ineffective assistance of counsel pertaining to the presentation of mitigation evidence at his sentencing hearing and requests that the trial court's judgment be reversed and the cause be remanded for second-stage postconviction proceedings.

¶ 19 The Act "provides a method by which defendants may assert that, in the proceedings which resulted in their convictions, there was a substantial denial of their federal and/or state constitutional rights." *People v. Wrice*, 2012 IL 111860, ¶ 47, 962 N.E.2d 934. A proceeding under the Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *People v. Beaman*, 229 Ill. 2d 56, 71, 890 N.E.2d 500, 509 (2008). The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008).

¶ 20 The Act establishes a three-stage process for adjudicating a postconviction petition. *Beaman*, 229 Ill. 2d at 71, 890 N.E.2d at 509. 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 2012). Our supreme court has held "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). A petition lacks an arguable legal basis when it is based on an indisputably meritless legal theory, such as one that is completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16, 912 N.E.2d at 1212. A petition lacks an arguable factual basis when it is based on a fanciful factual allegation, such as one that is clearly baseless, fantastic, or delusional. *Hodges*, 234 Ill. 2d at 16-17, 912 N.E.2d at 1212.

¶ 21 "In considering a petition pursuant to [section 122-2.1 of the Act], the [trial] court may examine the court file of the proceeding in which the petitioner was convicted, any action taken by an appellate court in such proceeding[,] and any transcripts of such proceeding." 725 ILCS 5/122-2.1(c) (West 2012); *People v. Brown*, 236 Ill. 2d 175, 184, 923 N.E.2d 748, 754 (2010). The petition must be supported by "affidavits, records, or other evidence supporting its allegations," or, if not available, the petition must explain why. 725 ILCS 5/122-2 (West 2012). Our review of the first-stage dismissal of a postconviction petition is *de novo*. *People v. Dunlap*, 2011 IL App (4th) 100595, ¶ 20, 963 N.E.2d 394 (citing *Brown*, 236 Ill. 2d at 184, 923 N.E.2d at 754).

¶ 22 In the case *sub judice*, defendant alleged in his postconviction petition that trial counsel was ineffective for failing to utilize affidavits from Dr. Swink and a local pharmacist as mitigating evidence pertaining to his addiction and his self-initiative to seek treatment. Defendant alleged he was injured in a car accident in 2005 and became addicted to Vicodin. Defendant

claimed Dr. Swink could have substantiated his claim that his addiction to prescription painkillers led to his use of illegal drugs. Defendant also noted the affidavits were not attached to his petition because he gave them to defense counsel and did not have access to counsel's file. Defendant contends, had the sentencing court had this evidence, he would have received a shorter prison sentence.

¶ 23 Here, defendant's postconviction petition raised an arguably meritorious claim of ineffective assistance of counsel. At sentencing, the trial court found no factors in mitigation. However, it is arguable that evidence regarding the circumstances of defendant's drug addiction and his prior attempts to treat it may have placed his background and recent offenses in a better light. See *People v. Whealon*, 185 Ill. App. 3d 570, 573, 541 N.E.2d 865, 866 (1989) (noting "in appropriate cases courts might consider drug addiction as a factor in mitigation"). Thus, the court erred in summarily dismissing defendant's postconviction petition.

¶ 24 Our supreme court has noted "the Act does not speak in terms of dismissing individual claims that are either frivolous or patently without merit." *People v. Rivera*, 198 Ill. 2d 364, 371, 763 N.E.2d 306, 310 (2001). Thus, "if some claims are subject to a dismissal at the first stage while others are not, the entire postconviction petition must be docketed for second-stage proceedings." *People v. Johnson*, 377 Ill. App. 3d 854, 858, 879 N.E.2d 977, 981 (2007) (citing *Rivera*, 198 Ill. 2d at 370-71, 763 N.E.2d at 310). As defendant's claim of ineffective assistance of trial counsel was not subject to dismissal at the first stage, the petition in its entirety must be docketed for second-stage proceedings. Thus, we need not discuss the remainder of defendant's claims.

¶ 25 Although we make no determination on the merits of defendant's claims, this

cause must be remanded to the trial court for second-stage proceedings. At the second stage, counsel may be appointed to represent defendant, and counsel will have the opportunity to amend the petitions. *People v. Boclair*, 202 Ill. 2d 89, 100, 789 N.E.2d 734, 741(2002); see also 725 ILCS 5/122-4 (West 2012). The State shall then file an answer or a motion to dismiss. 725 ILCS 5/122-5 (West 2012). At the second stage, the trial court "must determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation." *People v. Edwards*, 197 Ill. 2d 239, 246, 757 N.E.2d 442, 446 (2001). If a substantial showing of a constitutional violation is set forth, the cause will proceed to the third stage and an evidentiary hearing on the merits of the petition. *Boclair*, 202 Ill. 2d at 100, 789 N.E.2d at 741; see also *Edwards*, 197 Ill. 2d at 246, 757 N.E.2d at 446.

¶ 26 III. CONCLUSION

¶ 27 For the reasons stated, we reverse the trial court's judgment and remand for further proceedings.

¶ 28 Reversed and remanded for further proceedings.