

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2014 IL App (4th) 130139-U

NO. 4-13-0139

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

August 4, 2014
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Macon County
RYAN E. TYUS,)	No. 07CF1144
Defendant-Appellant.)	
)	Honorable
)	Katherine M. McCarthy,
)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Presiding Justice Appleton and Justice Harris concurred in the judgment.

ORDER

- ¶ 1 *Held:* The appellate court reversed the trial court's first-stage dismissal of defendant's postconviction petition. Defendant's claim that his privately retained counsel refused to engage in plea negotiations or prepare for trial unless defendant paid him an additional fee constituted the gist of a constitutional ineffective-assistance-of-counsel claim.
- ¶ 2 In August 2009, a jury convicted defendant, Ryan E. Tyus, of (1) controlled substance trafficking with a prior delivery-of-controlled-substance conviction (100 or more but less than 400 grams of a substance containing cocaine) (720 ILCS 570/401.1(a), 402(a)(1)(B) (West 2006)) and (2) criminal drug conspiracy with a prior delivery-of-controlled-substance conviction (100 or more but less than 400 grams of a substance containing cocaine) (720 ILCS 570/405.1 (West 2006)). Thereafter, the trial court sentenced defendant to 25 years in prison. On direct appeal, this court affirmed defendant's conviction and sentence. *People v. Tyus*, 2011 IL App (4th) 100168, ¶ 4, 960 N.E.2d 624.

¶ 3 In October 2012, defendant *pro se* filed a petition under the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-7 (West 2012)), attaching two affidavits in support. Defendant's petition alleged, as relevant to this appeal, that (1) while defendant was in pretrial custody, defense counsel conditioned his willingness to engage in plea negotiations and investigate defendant's case upon defendant's ability to pay an additional fee, and (2) appellate counsel was ineffective for failing to argue that the State did not prove the weight of the seized cocaine beyond a reasonable doubt. In December 2012, the trial court summarily dismissed defendant's petition, finding that the petition was frivolous and patently without merit.

¶ 4 Defendant appeals, arguing that the trial court erred by summarily dismissing his postconviction petition. Because we conclude that defendant's petition stated the gist of a claim of ineffective assistance of counsel, we reverse the court's judgment and remand further proceedings.

¶ 5 I. BACKGROUND

¶ 6 Our opinion in defendant's direct appeal set forth the bulk of pertinent facts leading to defendant's arrest and conviction. *Tyus*, 2011 IL App (4th) 100168, 960 N.E.2d 624. Because our resolution of this appeal turns on defendant's claim of ineffective assistance of counsel, we review only the facts necessary to an understanding of that issue.

¶ 7 A. Pretrial

¶ 8 On August 14, 2007, the State charged defendant with (1) controlled substance trafficking with a prior delivery-of-controlled-substance conviction and (2) criminal drug conspiracy with a prior delivery-of-controlled-substance conviction.

¶ 9 On August 24, 2007, attorney Bruce Cowan entered his appearance as defendant's counsel. On September 9, 2008, Cowan filed a motion to withdraw as counsel, alleging, in part,

that the attorney client relationship between defendant and Cowan had diminished to a point at which it was "impossible" for Cowan to be defendant's attorney. The trial court granted Cowan's motion to withdraw.

¶ 10 On September 15, 2008, attorney Jeff Justice entered his appearance as defendant's counsel. That same day, defendant filed a bond assignment, assigning \$20,000 of his bond to Justice for attorney fees.

¶ 11 In November 2008, attorney Timonthy Tighe entered his appearance for defendant, joining Justice as cocounsel. That same day, defendant filed a motion to suppress evidence illegally seized, alleging that all the State's evidence against defendant was the fruit of an illegal seizure of a United Parcel Service (UPS) package. On March 9, 2009, the trial court held a hearing on that motion. On March 23, 2009, the trial court denied defendant's motion to suppress.

¶ 12 B. Trial and Sentencing

¶ 13 In August 2009, following a trial, the jury found defendant guilty of the charged offenses. In October 2009, the trial court sentenced defendant to 30 years in prison. However, in February 2010, the court granted defendant's motion to reconsider sentence and resentenced defendant to a term of 25 years in prison.

¶ 14 C. Direct Appeal

¶ 15 On direct appeal, this court affirmed defendant's convictions and sentence, concluding that (1) the trial court properly denied defendant's motion to suppress evidence, (2) defendant's trial counsel was not ineffective for failing to file a motion to suppress evidence found inside defendant's truck, and (3) defendant forfeited his claim that the court erred by imposing a 25-year sentence. *Tyus*, 2011 IL App (4th) 100168, 960 N.E.2d 624.

¶ 16

D. Defendant's Postconviction Petition

¶ 17

In October 2012, defendant *pro se* filed the instant postconviction petition. Defendant also completed two notarized affidavits, which he attached to his petition. Defendant's eight-page, handwritten petition sets forth a multitude of claims that can be divided into the following categories: (1) sufficiency of the evidence; (2) the propriety of the trial court's evidentiary rulings; (3) ineffective assistance of trial counsel; and (4) ineffective assistance of appellate counsel. (We note that although attorneys Cowan, Justice, and Tighe represented defendant in the trial court, it is not entirely clear to whom defendant's ineffective-assistance-of-counsel claim applies because his petition simply refers to "counsel" and "appellate counsel.")

¶ 18

In December 2012, the trial court summarily dismissed defendant's postconviction petition in a written order. The court's order stated, in pertinent part, as follows:

"Many of the issues raised by Defendant in this Petition for Post-Conviction Relief were raised by the Defendant, or could have been raised in his appeal[,] and therefore the principle of *res judicata* applies. In addition, the Court finds that the Defendant's Petition for Post-Conviction Relief should be summarily dismissed as frivolous and patently without merit pursuant to Section 122-2.1(a)(2) [of the Code of Criminal Procedure of 1963 (725 ILCS 5/122-2.1(a)(2) (West 2012))] since the Petition has no arguable basis in either law or fact. The Court finds that the Post-Conviction Petition does not present the gist of a constitutional claim and should be dismissed. It should be noted that there are no affidavits, records, or any other documentary evidence attached to

the petition which would support the Defendant's allegations[,] nor are there any allegations as to why supporting documentations are not attached."

¶ 19 This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 Defendant argues that the trial court erred by summarily dismissing his postconviction petition. Specifically, defendant contends that his petition stated the gist of a constitutional claim of ineffective assistance of counsel (1) at the pretrial stage, in that his attorney refused to engage in plea negotiations or prepare for trial unless defendant paid him an additional fee; and (2) at the appellate stage, in that his appellate attorney failed to argue that the State did not prove the weight of the cocaine necessary to establish defendant's guilt for the charged offenses. We agree that defendant's petition stated the gist of a claim of ineffective assistance of trial counsel.

¶ 22 A. First-Stage Proceedings Under the Act
and the Standard of Review

¶ 23 A defendant may proceed under the Act by alleging that "in the proceedings which resulted in his or her conviction[,] there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both[.]" 725 ILCS 5/122-1(a)(1) (West 2012). "In noncapital cases, the Act establishes a three-stage process for adjudicating a postconviction petition." *People v. Andrews*, 403 Ill. App. 3d 654, 658, 936 N.E.2d 648, 652 (2010).

¶ 24 At the first stage of postconviction proceedings, the trial court must dismiss a petition in a written order if it determines the petition to be frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2012). "A post-conviction petition is considered frivolous or patent-

ly without merit only if the allegations in the petition, taken as true and liberally construed, fail to present the gist of a constitutional claim." (Internal quotations omitted.) *People v. Edwards*, 197 Ill. 2d 239, 244, 757 N.E.2d 442, 445 (2001). The "gist" standard does not require a petitioner to set forth the constitutional claim in its entirety, but instead, only a limited amount of detail. *People v. Scott*, 2011 IL App (1st) 100122, ¶ 24, 958 N.E.2d 1046. In *People v. Patton*, 315 Ill. App. 3d 968, 972, 735 N.E.2d 185, 189 (2000), this court wrote that to state the gist of a claim, a defendant need not construct legal arguments nor even understand what legal arguments the facts presented in his postconviction petition might support. "This is a purposely low threshold for survival because most petitions are drafted at this stage by defendants with little legal knowledge or training." *People v. Ligon*, 239 Ill. 2d 94, 104, 940 N.E.2d 1067, 1073 (2010).

¶ 25 This court reviews *de novo* a first-stage dismissal of a petition under the Act. *People v. Tate*, 2012 IL 112214, ¶ 10, 980 N.E.2d 1100.

¶ 26 B. Defendant's Claim of Ineffective Assistance
of Pretrial Counsel

¶ 27 "At the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance may not be summarily dismissed if [(1)] it is arguable that counsel's performance fell below an objective standard of reasonableness and [(2)] it is arguable that the defendant was prejudiced." *People v. Hodges*, 234 Ill. 2d 1, 17, 912 N.E.2d 1204, 1212 (2009).

¶ 28 Although defendant's postconviction petition included approximately 10 separate claims, defendant's brief to this court argues in support of the merits of only two of those claims. Because we conclude that defendant's claim of ineffective assistance of trial counsel stated the gist of a constitutional claim sufficient to move the petition past the first stage, we need only address that claim.

¶ 29 Defendant's postconviction petition included the following claim:

"(i) Defense counsel was ineffective when he told [defendant] that if he did not accept counsel's offer of 9 years and heard the motion to suppress[,] the State would be asking for 9 to 12 years.

(ii) [Defendant's] next offer was 18 years. Where petitioner ask[ed] his counsel "about the 9 years??"[] Counsel's response was to pay him his money and he would get [defendant] the 9 years that the People first offered.

(iii) Since [defendant] was in custody[,] [defendant] had no way to finish paying counsel any further. Counsel just wanted to hurry up and get the bond assignment."

¶ 30 Defendant attached two signed and notarized affidavits to his postconviction petition. (It is unclear why the trial court stated in its written order that defendant did not attach any affidavits to his petition in support of his allegations.) One of those affidavits stated, in its entirety, as follows:

"Prior to trial[,] counsel inform[ed] me that the State had an offer of 9 years if I did not hear my motion to suppress. Counsel told me if I heard my motion to suppress and if it did not get granted[,] my next offer was 18 years. Counsel was ineffective when he told me that my offer range[d] between 9 to 12 if I lost my motion to suppress. Counsel was also ineffective when he failed to do any more research on my case because he wanted another payment."

¶ 31 Applying a liberal construction, we interpret defendant's claim to be that his pre-

trial counsel was ineffective for essentially ceasing to represent defendant during the plea-bargaining and trial-preparation stages due to defendant's inability to provide an additional payment. We also note that defendant alleged in his petition—albeit in separate and distinct claims—that his counsel's performance at trial was hindered by inadequate preparation.

¶ 32 "Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process." *Lafler v. Cooper*, ___ U.S. ___, 132 S. Ct. 1376, 1384 (2012). Additionally, during the pretrial stages of representation, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S. 668, 691 (1984).

¶ 33 Defendants who retain their own lawyers are entitled to no less protection under the sixth amendment than defendants for whom the court appoints counsel. *Mickens v. Taylor*, 535 U.S. 162, 168, n. 2 (2002). Unless and until the court grants a criminal defense attorney leave to withdraw from representation, he remains under an obligation to provide effective assistance to his client. See Illinois Supreme Court Rule 13(c)(2) (eff. July 1, 1982) ("An attorney may not withdraw his appearance for a party without leave of court[.]") Judge Easterbrook of the Seventh Circuit succinctly stated the rule: "A criminal lawyer may not abandon a client whose funds have run out. Until relieved by a court, a lawyer must continue the representation[.]" *Kusay v. United States*, 62 F.3d 192, 196 (7th Cir. 1995). Taking as true defendant's claim that his counsel stopped actively representing him during the plea-bargaining and trial-preparation stages due to defendant's inability to provide payment, it is clearly arguable that counsel's performance fell below an objective standard of reasonableness.

¶ 34 It is also arguable that defendant was prejudiced by trial counsel's allegedly unreasonable performance. Defendant claimed that trial counsel told defendant that he could nego-

tiate a plea agreement with the State that would result in a nine-year sentence, but only if defendant paid him additional money to do so. The State argues that such a claim is "fantastic or delusional" because defendant was charged with offenses carrying a minimum sentence of 18 years in prison. However, the State ignores the fact that plea bargaining often entails swapping the initial charge for a less serious charge in exchange for the defendant's agreement to plead guilty. Nothing in the record suggests that such an option was not available in this case.

¶ 35 Defendant also alleged in his petition that because he was unable to provide an additional payment, pretrial counsel stopped investigating or researching his case. Defendant devoted a substantial portion of his petition to the allegedly perjured trial testimony of Sergeant Randy Sikowski, concluding that counsel's inadequate preparation resulted in Sikowski's damning testimony going largely unimpeached. Given these allegations, it is arguable that counsel's alleged refusal to prepare for trial prejudiced defendant.

¶ 36 C. First-Stage Dismissal Based Upon
Res Judicata and Forfeiture

¶ 37 We note that the trial court cited *res judicata*—and, somewhat indirectly, forfeiture—as bases for its first-stage dismissal of defendant's petition. Although the doctrines of *res judicata* and forfeiture may support the first-stage dismissal of a postconviction petition (*People v. Blair*, 215 Ill. 2d 427, 447, 831 N.E.2d 604, 617 (2005)), an exception to these principles applies when "facts relating to the claim do not appear on the face of the original appellate record." *Id.* at 451, 831 N.E.2d at 619.

¶ 38 In this case, defendant claimed, among other things, that he received ineffective assistance of counsel at the pretrial, trial, and appellate stages of proceedings. Specifically, defendant claimed that his (1) pretrial counsel was ineffective during the plea-bargaining and trial-preparation stages, (2) trial counsel was unprepared to effectively challenge the State's evidence,

and (3) appellate counsel was ineffective for failing to raise certain arguments. These claims were based largely—if not entirely—upon facts outside the record. This court has repeatedly held that a postconviction petition is the appropriate vehicle for a defendant to raise such claims. See, e.g., *People v. Weeks*, 393 Ill. App. 3d 1004, 1011, 914 N.E.2d 1175, 1182 (2009) ("Claims of ineffective assistance of counsel are usually reserved for postconviction proceedings where a trial court can conduct an evidentiary hearing, hear defense counsel's reasons for any allegations of inadequate representation, and develop a complete record regarding the claim and where attorney-client privilege no longer applies.") Accordingly, we caution trial courts to avoid summarily dismissing a postconviction petition based upon *res judicata* and forfeiture when the facts supporting the defendant's claims are likely to be found outside the record.

¶ 39

III. CONCLUSION

¶ 40

For the reasons stated, we reverse the trial court's first-stage dismissal of defendant's postconviction petition, and remand for further proceedings under the Act. In so doing, we express no opinion of the merits of defendant's other postconviction claims.

¶ 41

Reversed and remanded.