2015 IL App (4th) 130932-U

NO. 4-13-0932

FILED
May 20, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
KENNETH L. DALTON,	)	No. 10CF2153
Defendant-Appellant.	)	
	)	Honorable
	)	Richard P. Klaus,
	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: The trial court erred by summarily dismissing defendant's postconviction petition where defendant's claim of ineffective assistance of appellate counsel for failure to raise an excessive-sentence claim on direct appeal stated the gist of a constitutional claim.

¶ 2 In December 2010, the State charged defendant, Kenneth L. Dalton, with aggravated driving under the influence (DUI) and driving while license revoked (DWLR). In April 2011, defendant pleaded guilty to the DWLR charge, and, following a trial, a jury convicted defendant of DUI. In May 2011, the Champaign County circuit court entered judgment on the aggravated DUI charge, a Class 2 felony, and thereafter sentenced defendant as a Class X offender to a 25-year prison term based on defendant's prior Class 2 felony convictions. The court also sentenced defendant to a concurrent six-year prison term on the DWLR charge, which was reduced to three years on direct appeal.

¶ 3 In July 2013, defendant filed a *pro se* postconviction petition, which the trial court summarily dismissed as frivolous and patently without merit. Defendant appeals, arguing his claim of ineffective assistance of appellate counsel stated the gist of a constitutional claim. We reverse and remand for further proceedings.

¶ 4 I. BACKGROUND

¶ 5 In December 2010, the State charged defendant with (1) aggravated DUI, a Class 2 felony (625 ILCS 5/11-501(a)(2), (d)(2)(B) (West 2010)) (count I), based on defendant committing DUI with two prior DUI convictions; (2) aggravated driving with a drug, substance, or compound in his body, a Class 2 felony (625 ILCS 5/11-501(a)(6), (d)(2)(B) (West 2010)) (count II); and (3) DWLR, a Class 4 felony (625 ILCS 5/6-303(a-5) (West 2010) (text of section effective until July 1, 2011)) (count III). In April 2011, defendant pleaded guilty to count III, and the State dismissed count II. Thereafter, the trial court commenced a jury trial on count I. At the conclusion of the trial, the jury found defendant guilty of aggravated DUI. The evidence relevant to the issue on appeal follows.

¶ 6 Champaign County sheriff's deputy Jonathon Reifsteck testified on December 24, 2010, at about 12:30 a.m., he stopped defendant in Champaign County, Illinois, for traveling 61 miles per hour in a 45-mile-per-hour zone. When Reifsteck made contact with defendant, he noticed defendant's eyes were bloodshot and glassy, and Reifsteck could detect a "strong odor of an alcoholic beverage" on defendant's breath. Upon questioning defendant, Reifsteck noticed defendant's speech "was somewhat slurred." Reifsteck asked defendant to perform field sobriety tests, and defendant agreed. While he was performing the tests, defendant indicated to Reifsteck he needed to use the restroom. Reifsteck refused to allow defendant to do so until defendant completed the tests. During the tests, defendant urinated on himself. The trial court admitted

into evidence a video recording of the traffic stop and allowed the State to play the recording for the jury. The State also showed the jury a photograph taken of defendant at the time of his arrest.

¶ 7 Following the field sobriety tests, Reifsteck concluded defendant was under the influence of alcohol. Reifsteck arrested defendant and transported him to jail, where defendant refused to submit to chemical testing. Reifsteck later inventoried defendant's pickup truck and found one 24-ounce Ice House beer can under the driver's seat and three 24-ounce cans in the bed. The cans were open and contained "the minimal amount of a liquid substance that smelled of beer."

¶ 8 Defendant testified he worked as a cook at Montana Mike's restaurant. On December 23, 2012, he worked until 4 p.m. and then helped a friend move furniture. When he returned home later that evening, he watched television with his fiancée. According to defendant, he consumed a lot of water because he felt dehydrated from working in the hot kitchen earlier that day. He denied drinking any alcohol. Around 11:20 p.m., defendant decided to drive to a convenience store to buy a can of beer.

¶ 9 After buying one can of Ice House beer, defendant "took like a little cruise." During the ride, he drank part of the can of beer and realized he had to urinate so he "tried to hurry up and get to where [he] could get a place to use the restroom." Defendant saw the flashing lights of a police car in his rearview mirror, so he pulled into a Schnuck's parking lot. When defendant got out of his car, he felt he "had to urinate really bad" and asked Reifsteck if he could use the restroom. Reifsteck did not allow him to do so. Defendant testified he had difficulty completing the field sobriety tests because he "had to urinate." He explained he has "weak kidneys." The urge to urinate intensified during the field tests, and defendant was forced

to urinate on himself.

¶ 10 In May 2011, defendant filed a motion for a judgment of acquittal and a new trial, which the trial court denied. At defendant's sentencing hearing, defendant presented the testimony of his friends, David and Taryn Mabon; his brother, Terry Dalton, and his fiancée, Angela Robinson. David testified defendant had turned his life around since getting out of prison. Before the latest DUI, defendant had been working two jobs and was a family man. Taryn testified she often sought spiritual advice from defendant. Terry testified defendant was no longer using illegal substances. Defendant had taken cooking classes and worked regularly. Terry also noted defendant was very involved with his family. Robinson testified defendant had been working regularly and behaving himself when it came to drugs and alcohol. Defendant himself apologized for his poor decision making and expressed remorse. He stated he desired to continue to become a more productive member of society. Defendant also presented a letter from his sister, a certificate from a drug treatment program, and a certificate showing his work in restaurant education and food services.

¶ 11 Defendant's presentence report indicated defendant had previously been convicted of DUI twice in the 1990s. Moreover, defendant had convictions for (1) possession of cannabis; (2) manufacturing or delivering cannabis; (3) manufacturing or distributing a lookalike substance; (4) domestic battery; and (5) burglary, a Class 2 felony (in total, defendant had five burglary convictions). Defendant had numerous traffic violations, including the suspension or revocation of his driver's license. Defendant's prior longest prison term was 12 years, and he last left prison in December 2009. Defendant was due to be discharged from mandatory supervised release on December 29, 2011. The trial court sentenced defendant as a Class X felon to a 25-year prison term for aggravated DUI and a concurrent 6-year prison term for DWLR. In June

2011, defendant filed a motion to reconsider sentence, which the trial court denied following a July 2011 hearing.

¶ 12 Defendant appealed, arguing (1) his conviction for aggravated DUI should be reduced to a misdemeanor because the State did not present his prior convictions to the jury, and the jury found him guilty only of an unenhanced DUI; (2) the trial judge lacked authority to impose a Class X sentence because defendant was only "convicted" of a misdemeanor that was enhanced to a felony for sentencing purposes; and (3) the extended-term sentence imposed on the Class 4 DWLR was improper. *People v. Dalton*, 2012 IL App (4th) 110482-U, ¶¶ 1-3. This court rejected the first and second arguments but ordered the DWLR sentence reduced to three years. *Dalton*, 2012 IL App (4th) 110482-U, ¶ 39.

¶ 13 On July 26, 2013, defendant filed a *pro se* petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/art. 122 (West 2012)). Therein, defendant claimed (1) appellate counsel was ineffective for failing to raise the meritorious issues identified in the petition; (2) appellate counsel was ineffective for failing to challenge the 25-year aggravated DUI sentence as excessive; (3) counsel was ineffective for failing to properly challenge the sentencing issues included in the motion to reconsider sentence; (4) counsel was ineffective for failing to challenge the DUI statute as vague and ambiguous; (5) appellate counsel was ineffective for failing to challenge the admission of tainted video and audio evidence; and (6) counsels were ineffective for failing to challenge the "process of enhancement" in the motion to reconsider sentence.

¶ 14 Defendant attached his own affidavit to the petition, stating appellate counsel refused to raise his excessive sentence issues. Defendant also attached a letter from appellate counsel explaining why he did not raise the issue regarding an excessive sentence on appeal.

Defendant included a letter he wrote to appellate counsel "formally" requesting counsel raise several issues on appeal.

¶ 15 On October 1, 2013, the trial court dismissed defendant's petition, finding it frivolous and patently without merit. On October 21, 2013, defendant filed a notice of appeal, which failed to note he was appealing the dismissal of his postconviction petition. On November 20, 2013, defendant filed a timely amended notice of appeal in compliance with Illinois Supreme Court Rules 606 (eff. Feb. 6, 2013) and 303(b)(5) (eff. Jan. 1, 2015). Accordingly, this court has jurisdiction of defendant's postconviction petition under Illinois Supreme Court Rule 651(a) (eff. Feb. 6, 2013).

¶ 16 II. ANALYSIS

¶ 17 Defendant argues the trial court erred in summarily dismissing his postconviction petition, claiming his appellate counsel provided constitutionally ineffective assistance when he failed to challenge his near-maximum 25-year sentence as excessive. We agree.

¶ 18 The Postconviction Act "provides a mechanism for criminal defendants to challenge their convictions or sentences based on a substantial violation of their rights under the federal or state constitutions." *People v. Morris*, 236 Ill. 2d 345, 354, 925 N.E.2d 1069, 1075 (2010). A proceeding under the Postconviction Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *People v. English*, 2013 IL 112890, ¶ 21, 987 N.E.2d 371. 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).

¶ 19 The Postconviction Act establishes a three-stage process for adjudicating a postconviction petition. *English*, 2013 IL 112890, ¶ 23, 987 N.E.2d 371. 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). To survive dismissal at this initial stage, the postconviction petition "need only present the gist of a constitutional claim," which is "a low threshold" that requires the petition to contain only a limited amount of detail. *People v. Gaultney*, 174 Ill. 2d 410, 418, 675 N.E.2d 102, 106 (1996). Our supreme court has held "a *pro se* petition seeking postconviction relief under the [Postconviction] 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.

¶ 20 "In considering a petition pursuant to [section 122-2.1 of the Postconviction 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.

¶ 21 Claims of ineffective assistance of trial and appellate counsel are evaluated under

the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Enis*, 194 Ill. 2d 361, 377, 743 N.E.2d 1, 11 (2000). A defendant raising a claim of ineffective appellate counsel "must show both that appellate counsel's performance was deficient and that, but for counsel's errors, there is a reasonable probability that the appeal would have been successful." *People v. Petrenko*, 237 Ill. 2d 490, 497, 931 N.E.2d 1198, 1203 (2010). At the first stage of postconviction proceedings, "a petition alleging ineffective assistance of counsel may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *Petrenko*, 237 Ill. 2d at 497, 931 N.E.2d at 1203 (citing *Hodges*, 234 Ill. 2d at 17, 912 N.E.2d at 1212). We note appellate counsel is not required to raise every conceivable issue on appeal, and counsel is not incompetent for refraining from raising meritless issues. *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 77, 962 N.E.2d 528. Accordingly, in this case, under both prongs of the *Strickland* test the focus is on the merit of defendant's excessive-sentence claim.

¶ 22 Defendant argues his excessive-sentence claim has both arguable legal and factual merit as it had a reasonable probability of success. The State disagrees, contending the excessive-sentence claim is meritless because of defendant's criminal history and the fact the trial court did consider defendant's mitigation evidence.

¶ 23 The Illinois Constitution mandates "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. " 'In determining an appropriate sentence, a defendant's history, character, and rehabilitative potential, along with the seriousness of the offense, the need to protect society, and the need for deterrence and punishment, must be equally weighed.' " *People v. Hestand*, 362 Ill. App. 3d 272, 281, 838 N.E.2d 318, 326 (2005) (quoting

People v. Hernandez, 319 Ill. App. 3d 520, 529, 745 N.E.2d 673, 681 (2001)). However, "the seriousness of an offense is considered the most important factor in determining a sentence." *People v. Jackson*, 2014 IL App (1st) 123258, ¶ 53, 23 N.E.3d 430.

¶ 24 With excessive-sentence claims, this court has explained appellate review of a defendant's sentence as follows:

> "A trial court's sentencing determination must be based on the particular circumstances of each case, including factors such as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. [Citations.] Generally, the trial court is in a better position than a court of review to determine an appropriate sentence based upon the particular facts and circumstances of each individual case. [Citation.] Thus, the trial court is the proper forum for the determination of a defendant's sentence, and the trial court's decisions in regard to sentencing are entitled to great deference and weight. [Citation.] Absent an abuse of discretion by the trial court, a sentence may not be altered upon review. [Citation.] If the sentence imposed is within the statutory range, it will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense." (Internal quotation marks omitted.) *People v. Price*, 2011 IL App (4th) 100311, ¶ 36, 958 N.E.2d 341 (quoting *People v. Hensley*, 354 Ill. App. 3d 224, 234-35, 819 N.E.2d 1274,

1284 (2004)).

¶ 25 Here, a jury found defendant guilty of aggravated DUI, a Class 2 felony (625 ILCS 5/11-501(a)(2), (d)(2)(B) (West 2010)), based on defendant committing DUI with two prior DUI convictions. Section 5-4.5-95(b) of the Unified Code of Corrections (730 ILCS 5/5-4.5-95(b) (West 2010)) provides when a defendant is convicted of a Class 2 felony, after having twice been convicted of an offense that contains the same elements as an offense now classified as a Class 2 or greater felony, the defendant shall be sentenced as a Class X offender. A person convicted of a Class X felony is subject to a sentencing range of 6 to 30 years in prison. 730 ILCS 5/5-4.5-25(a) (West 2010). Thus, the trial court's sentence of 25 years in prison was within the relevant sentencing range.

¶ 26 Here, defendant's excessive-sentence claim does have an arguable legal basis as it is not completely contradicted by the record. In his petition, defendant notes that, during the commission of the offense he did not cause an accident, property damage, or harm to any person. Defendant also points out he was sentenced as a Class X offender based on his criminal record and not the nature of the offense. He argues that, while aggravated DUI is serious, his offense was not so serious as to warrant a 25-year sentence. As noted, a sentence may constitute an abuse of discretion if the sentence is " 'manifestly disproportionate to the nature of the offense.' " *Price*, 2011 IL App (4th) 100311, ¶ 36, 958 N.E.2d 341 (quoting *Hensley*, 354 Ill. App. 3d at 235, 819 N.E.2d at 1284).

¶ 27 As to an arguable factual basis, defendant's claim is not clearly baseless or delusional. Defendant notes nothing was harmed during the commission of his offense and his prior DUIs were 15 and 20 years old. Moreover, as stated, defendant ended up properly being sentenced as a Class X offender based on his prior criminal record and not the nature of his

offense. Defendant's claims are supported by the record, which also shows defendant presented a significant amount of mitigation evidence at his sentencing hearing. Thus, defendant states an arguable factual basis for his ineffective-assistance-of-appellate-counsel claim.

¶ 28 Accordingly, we find defendant's petition does meet the low threshold of stating a gist of a constitutional claim of ineffective assistance of appellate counsel for failure to raise an excessive-sentence claim. In light of our finding, the entire postconviction petition must be remanded for further proceedings because "summary partial dismissals are not permitted at the first stage of a postconviction proceeding." *Hodges*, 234 Ill. 2d at 22 n.8, 912 N.E.2d at 1215 n.8. However, our finding is in no way an opinion on the actual merits of the issue or on whether defendant will ultimately prevail on his ineffective-assistance claim. See *Hodges*, 234 Ill. 2d at 22, 912 N.E.2d at 1215.

¶ 29 III. CONCLUSION

¶ 30 For the reasons stated, we reverse the Champaign County circuit court's judgment and remand the cause for further proceedings. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 31 Reversed and remanded.