2017 IL App (4th) 150405-U

NO. 4-15-0405

FILED
July 10, 2017
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.	)	Vermilion County
RANDY WILLIAMS,	)	No. 12CF136
Defendant-Appellant.	)	
	)	Honorable
	)	Craig H. DeArmond,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Holder White and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed in part and vacated in part, concluding (1) defendant procedurally defaulted the claims in his postconviction petition, and even if they were not procedurally defaulted, they are frivolous and patently without merit; and (2) the circuit clerk erroneously imposed multiple fines.

¶ 2 In March 2015, defendant, Randy Williams, filed a *pro se* petition for postconviction relief (725 ILCS 5/122-1 (West 2014)), alleging (1) his trial counsel was ineffective because counsel failed to present mitigating evidence at sentencing and (2) the trial court failed to adequately admonish him as to his two-year term of mandatory supervised release (MSR). In May 2015, the trial court dismissed defendant's petition for being frivolous and patently without merit. Defendant appeals, arguing (1) the trial court erroneously dismissed his petition because it presented the gist of a constitutional claim and (2) the circuit clerk improperly imposed several fines. For the following reasons, we affirm in part and vacate in part.

¶ 3 I. BACKGROUND

¶ 4 On November 19, 2011, defendant drove a vehicle with his girlfriend, and four children age two and under as passengers. Defendant's vehicle collided with a pickup truck driven by Gerald Moreman, who was pronounced dead at the scene. Defendant's girlfriend suffered multiple fractures and a collapsed lung, and one of the children suffered a broken leg. Blood samples taken from defendant after the collision tested positive for tetrahydrocannabinol, morphine, hydrocodone, and cocaine metabolite.

¶ 5 On March 14, 2012, the State charged defendant by information with (1) aggravated driving under the influence (no insurance) (count I) (625 ILCS 5/11-501(d)(1)(I) (West 2010)); (2) aggravated driving under the influence (fatality) (count II) (625 ILCS 5/11-501(d)(1)(F) (West 2010)); (3) aggravated driving under the influence (bodily harm to child) (count III) (625 ILCS 5/11-501(d)(1)(J) (West 2010)); and (4) aggravated driving under the influence (great bodily harm) (count IV) (625 ILCS 5/11-501(d)(1)(C) (West 2010)).

¶ 6 On August 9, 2013, defendant pleaded guilty to count II, a Class 2 felony. In exchange, the State agreed to (1) dismiss the remaining counts, (2) dismiss Vermilion County case No. 11-CF-317 (where defendant was charged with criminal trespass to a residence (720 ILCS 5/19-4(a)(2) (West 2010)), and (3) a sentencing cap of 10 years' imprisonment. During the plea hearing, the trial court advised defendant, in relevant part, as follows:

> "If you enter this plea, you're going to get the ten years. So, if you want to talk it over with your lawyer, that's fine, but I'm not going to do this and leave you under the impression with, 'Oh, well. The most you can get is ten years.' Considering the circumstances of the offense and your prior criminal history, you're going to get the

> ten years. So, if you want to do the plea, that's fine. If you don't want to do the plea, that's fine. But you need to know that going in. I'm not going to lead you to believe that, 'Oh, there's a possibility that you might get less than that,' because there's not. Without the plea, if you were convicted, I'd sentence you to the maximum I could sentence you to."

After consulting with his attorney, defendant proceeded with the plea. The trial court reminded defendant, "you would receive a sentence of—a maximum of up to ten years in the penitentiary, and I've told you that when you go for sentencing, that's the sentence that you're going to receive." The court also advised defendant, "[u]pon your release from the Department of Corrections, you would be required to serve two year's [*sic*] [MSR], or parole." Defendant also signed an "Admonishment of Rights" form, which explained, if he is sentenced to prison, upon completion of his prison sentence, he would be subject to a period of "Mandatory Supervised Release (Parole)" of two years for a Class 2 felony.

¶ 7 On August 30, 2013, the trial court held a sentencing hearing. Neither the State nor defense counsel presented additional evidence. The State recommended a sentence of 10 years' imprisonment and defense counsel requested a sentence of less than 10 years. Defendant gave a statement in allocution, apologizing for his actions and to Moreman's family. The court sentenced defendant to 10 years' imprisonment. The court discussed the circumstances of the offense, stating:

> "Your excuse throughout has been, 'Well, I had a traumatic brain injury as a result of a dirt bike collision when I was a child.' There's nothing about a traumatic brain injury that causes you to

> drive under the influence of drugs and/or alcohol at such an incredibly high rate of speed and smash into a truck. The fact that you were doing this in a vehicle that contained young children was bad enough. The fact that you killed somebody is just kind of a culmination of what you've done over time."

¶ 8 On September 16, 2013, defendant filed a notice of appeal. This court granted defendant's agreed motion for summary remand with directions "that the defendant be given proper admonishments pursuant to [Illinois] Supreme Court Rule 605(c) [(eff. Oct. 1, 2001)] so that it can be clear that he must file a post-plea motion in compliance with [Illinois] Supreme Court Rule 604(d) [(eff. Feb. 6, 2013)]." *People v. Williams*, No. 4-13-0789 (Jan. 3, 2014) (agreed order for summary remand).

¶ 9 On January 10, 2014, the trial court held a hearing and admonished defendant in accordance with Rule 605(c). No appeal followed.

¶ 10 On March 13, 2015, defendant filed a *pro se* postconviction petition. Defendant alleged (1) his trial counsel was ineffective because counsel failed to present at sentencing (a) mitigating evidence about his psychiatric state and (b) character witnesses, and (2) the trial court failed to adequately admonish him as to his two-year term of MSR.

¶ 11 On May 5, 2015, the trial court summarily dismissed defendant's petition. As to defendant's claim of ineffective assistance of counsel, the court found:

> "Petitioner's history of traumatic brain injury was before the Court as is evidenced by both the transcript at the sentencing hearing he attached to his petition and the pre-sentence report which included his medical and mental health records.

> In addition, as the Court noted at the time of sentencing, the Petitioner entered into the plea, already knowing ahead of time that the Court would be sentencing him to the 10 year maximum available under the plea. *** Although technically [an] 'open' plea, the Petitioner entered into the plea agreement already aware of his sentence; just as if it were a plea to a specific sentence. Knowing this, he chose to proceed in order to obtain the benefit of reduced exposure."
>
> The court also discussed defendant's MSR claim and stated:
>
> "[T]he record itself belies that allegation. The Admonishment of Rights form filed August 9, 2013 is in the record. The transcript Petitioner attached to his Petition shows in [page] 9 that he was informed of the two[-]year period of [MSR] and there is no legal authority for the claim that he is to be given some opportunity to 'object/question/inquire' about the MSR at the time it is imposed."

¶ 12 This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 Defendant raises two arguments on appeal. First, defendant argues the trial court erred when it summarily dismissed his postconviction petition during first-stage proceedings because at least two of his claims presented the gist of a constitutional claim. Second, defendant argues the circuit clerk improperly imposed several fines and they must be vacated. We address each of these contentions in turn.

¶ 15 A. Postconviction Petition

¶ 16 Defendant argues two of his claims presented the gist of a constitutional claim and, as such, the trial court erred when it summarily dismissed his petition. First, defendant argues he successfully pleaded the gist of a constitutional claim of ineffective assistance of counsel by alleging his attorney failed to present important mitigating evidence at sentencing. Second, he contends he was denied the benefit of his bargain when the court failed to admonish him he would serve a two-year term of MSR as a part of the plea he negotiated with the State. The State argues the issues in defendant's petition are procedurally defaulted and, alternatively, the court properly dismissed his petition because it was frivolous and patently without merit.

¶ 17 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2014)) "provides a method by which persons under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both." *People v. Johnson*, 2017 IL 120310, ¶ 14. A proceeding under the Act has three stages. At the first stage, the trial court determines, while taking the allegations as true, whether the petition is frivolous or without merit. 725 ILCS 5/122-2.1(a)(2) (West 2014). A petition may be summarily dismissed as frivolous or without merit when it has no arguable basis in either law or in fact. *People v. Hodges*, 234 Ill. 2d 1, 16, 912 N.E.2d 1204, 1212 (2009). Since most petitions at this stage are typically drafted by *pro se* defendants, they only need to present a limited amount of detail, and the threshold for survival is low. *Hodges*, 234 Ill. 2d at 9, 912 N.E.2d at 1208; *People v. Tate*, 2012 IL 112214, ¶ 9, 980 N.E.2d 1100. Our review of a dismissal at this stage is *de novo*. *People v. Allen*, 2015 IL 113135, ¶ 19, 32 N.E.3d 615.

¶ 18 An action under the Act is a collateral attack on the trial court proceedings—not an appeal from the judgment of conviction. *Tate*, 2012 IL 112214, ¶ 8, 980 N.E.2d 1100. As

such, issues raised and decided on direct review are barred by *res judicata*, and, as the State argues in this case, issues that could have been raised but were not are procedurally defaulted. *Tate*, 2012 IL 112214, ¶ 8, 980 N.E.2d 1100. However, procedural default does not preclude a defendant from raising an issue on collateral review that depended upon facts not found in the record. *People v. Veach*, 2017 IL 120649, ¶ 47.

¶ 19 First, defendant's claim of ineffective assistance of counsel should have been raised on direct review because the issues he complains of were part of the record. Assuming, *arguendo*, this issue was not procedurally defaulted, it is without merit. To establish a claim of ineffective assistance of counsel, defendant has the burden to show his claim satisfies the two-pronged *Strickland* test: (1) counsel's performance fell below an objective standard of reasonableness; and (2) the deficient performance resulted in prejudice to defendant such that, but for counsel's errors, a different result would have been reached. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶ 20 Defendant claims counsel's performance fell below an objective standard of reasonableness when he failed to present important mitigating evidence at sentencing. More specifically, defendant argues counsel should have presented evidence of his psychiatric state, head trauma, and his character and emotional state, which would have resulted in him receiving a sentence of less than 10 years. We disagree. It is clear from the record the trial court was aware of these factors, as they were discussed throughout the proceedings. Regardless, even if the trial court had not been aware of such factors, defendant was not prejudiced by counsel's alleged deficiency. In sentencing defendant, the court expressed its view that, absent the plea agreement approved by the family of the victim, it would have sentenced defendant to 14 years in prison,

the maximum under the statute. Accordingly, defendant has failed to show he would have received a lesser sentence if counsel had presented these mitigating factors at sentencing.

¶ 21 Second, defendant's argument he was denied the benefit of his bargain when the trial court failed to admonish him he would serve a two-year term of MSR is also procedurally defaulted because it was part of the record and should have been raised on direct review. Again, assuming, *arguendo*, this claim was not procedurally defaulted, it is without merit.

¶ 22 In *People v. Whitfield*, 217 Ill. 2d 177, 195, 840 N.E.2d 658, 669 (2005), our supreme court held:

> "[T]here is no substantial compliance with Rule 402 and due process is violated when a defendant pleads guilty in exchange for a specific sentence and the trial court fails to advise the defendant, prior to accepting his plea, that a mandatory supervised release term will be added to that sentence. In these circumstances, addition of the MSR term to the agreed-upon sentence violates due process because the sentence imposed is more onerous than the one defendant agreed to at the time of the plea hearing. Under these circumstances, the addition of the MSR constitutes an unfair breach of the plea agreement."

¶ 23 Defendant cites *People v. Morris*, 236 Ill. 2d 345, 366, 925 N.E.2d 1069, 1082 (2010), arguing although the trial court admonished him about MSR when it explained the possible sentencing range, an ordinary person in the circumstances of the accused would not understand it to convey the required warning. Defendant notes the application of *Morris* to his circumstances is in direct conflict with this court's precedent and requests we reconsider our

prior interpretation. See *People v. Dorsey*, 404 Ill. App. 3d 829, 942 N.E.2d 535 (2010); see also *People v. Lee*, 2012 IL App (4th) 110403, 979 N.E.2d 992. We decline defendant's request and continue to hold, "While the best practice may be for the trial court or counsel to expressly link the MSR term to the agreed-upon sentence [citation], failure to make that link does not violate Rule 402 or the parties' plea agreement." *Lee*, 2012 IL App (4th) 110403, ¶ 26, 979 N.E.2d 992. In this case, the trial court explained to defendant, prior to accepting his guilty plea, that he would be required to serve a two-year period of "Mandatory Supervised Release" or "Parole" upon his release from prison. Additionally, defendant was put on written notice of his MSR term on the "Admonishment of Rights" form he signed. As such, defendant was properly admonished in accordance with Illinois Supreme Court Rule 402 (eff. July 1, 2012) and our supreme court's precedent.

¶ 24 Defendant's claims are procedurally defaulted, and the trial court's summary dismissal was proper because his claims were frivolous and without merit.

¶ 25 B. Circuit Clerk Assessments

¶ 26 Defendant argues, and the State concedes, this court should vacate fines imposed by the circuit clerk because they are void. He seeks vacatur of the following assessments: $2 "Anti-Crime Fund," $20 "Violent Crime," $4 "Youth Diversion," and $3.80 "Drug Court."

¶ 27 "This court has consistently held the circuit clerk does not have the power to impose fines." *People v. Montag*, 2014 IL App (4th) 120993, ¶ 37, 5 N.E.3d 246. The imposition of a fine is exclusively a judicial act and, accordingly, a judge can only impose fines. *People v. Smith*, 2014 IL App (4th) 121118, ¶ 18, 18 N.E.3d 912. Therefore, a circuit clerk has no authority to impose fines, and any fines imposed by the clerk are void. See *People v. Warren*, 2016 IL App (4th) 120721-B, ¶ 89, 55 N.E.3d 117. Where a circuit clerk imposed fines, a

reviewing court must only vacate them, because a remand for the trial court to correct such an error results in an impermissible increase in the defendant's sentence on remand, which goes against our supreme court's decision in *People v. Castleberry*, 2015 IL 116916, ¶ 25, 43 N.E.3d 932. *People v. Daily*, 2016 IL App (4th) 150588, ¶ 30, 74 N.E.3d 15.

¶ 28 Here, the record is devoid of an order, written or oral, by the trial court judge authorizing the imposition of the assessments defendant challenges. Instead, the circuit clerk imposed them. As such, we must decide whether the assessments defendant challenges are fines.

¶ 29 1. *"Anti-Crime Fund"*

¶ 30 The circuit clerk imposed a $2 "Anti-Crime Fund" assessment (730 ILCS 5/5-6-3(b)(13) (West 2010)). The "Anti-Crime Fund" assessment is a fine. *People v. Hible*, 2016 IL App (4th) 131096, ¶ 18, 53 N.E.3d 319. Therefore, it was improper for the circuit clerk to impose the fine, and we vacate it. Additionally, it is important to note this fine can be imposed only as a condition of probation, and because defendant was sentenced to prison, this fine is inapplicable to him. See *Hible*, 2016 IL App (4th) 131096, ¶ 18, 53 N.E.3d 319; see also *People v. Jernigan*, 2014 IL App (4th) 130524, ¶ 48, 23 N.E.3d 650.

¶ 31 2. *"Violent Crime"*

¶ 32 The circuit clerk imposed a $20 "Violent Crime" assessment (725 ILCS 240/10(c)(2) (West 2010)). "The [Violent Crime] Victims Assistance Act assessment is a mandatory fine that only the court has authority to impose." *Smith*, 2014 IL App (4th) 121118, ¶ 63, 18 N.E.3d 912. Accordingly, we vacate the $20 "Violent Crime" assessment imposed by the clerk.

¶ 33 3. *"Youth Diversion"*

¶ 34 The circuit clerk imposed a $4 "Youth Diversion" assessment (55 ILCS 5/5-1101(e) (West 2010)). This assessment is a fine. *People v. Graves*, 235 Ill. 2d 244, 251, 919 N.E.2d 906, 910 (2009). The circuit clerk improperly imposed this fine, and we vacate it.

¶ 35 4. *"Drug Court"*

¶ 36 Last, the circuit clerk imposed a $3.80 "Drug Court" assessment (55 ILCS 5/5-1101(f) (West 2010)). This assessment is a fine. *Warren*, 2016 IL App (4th) 120721-B, ¶ 138, 55 N.E.3d 117. Because the clerk improperly imposed the $3.80 "Drug Court" fine, we vacate it.

¶ 37 III. CONCLUSION

¶ 38 For the foregoing reasons, we vacate the following assessments: $2 "Anti-Crime Fund," $20 "Violent Crime," $4 "Youth Diversion," and $3.80 "Drug Court." We otherwise affirm the conviction and sentence. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2016).

¶ 39 Affirmed in part and vacated in part.