2017 IL App (5th) 140143-U

NO. 5-14-0143

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT



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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | St. Clair County. |
| | ) | |
| v. | ) | No. 09-CF-944 |
| | ) | |
| MARVIN J. BURRIES, | ) | Honorable |
| | ) | John Baricevic, |
| Defendant-Appellant. | ) | Judge, presiding. |

JUSTICE WELCH delivered the judgment of the court.
Justices Chapman and Barberis concurred in the judgment.

**ORDER**

¶ 1 *Held*: The circuit court's dismissal of the defendant's postconviction petition is reversed and the cause is remanded for second-stage postconviction proceedings where the defendant demonstrated the gist of a constitutional claim that his plea was not knowing and voluntary.

¶ 2 The defendant-appellant, Marvin Burries, appeals from the judgment dismissing his petition for postconviction relief. He contends that his petition stated the gist of a constitutional claim that his guilty plea was not knowing and voluntary. He also asserts that the trial court erred in not giving him credit for time served between the date of his arrest and the date he was transported to a Department of Human Services (DHS) facility. For the following reasons, we reverse and remand for second-stage postconviction

proceedings and modify the defendant's mittimus to include an additional 207 days of presentence credit.

¶ 3 The defendant was arrested on August 19, 2009. On August 21, 2009, he was charged with predatory criminal sexual assault of a child in violation of section 12-14.1(a)(1) of the Criminal Code of 1961 (720 ILCS 5/12-14.1(a)(1) (West 2006)).[1] Dr. Daniel J. Cuneo evaluated the defendant for fitness to be prosecuted.

¶ 4 Dr. Cuneo's January 28, 2010, written report noted that he had previously evaluated the defendant at the court's request on January 27, 2003. It was his opinion then that the defendant could best be diagnosed as having "Moderate Mental Retardation" as indicated by his performance on the "Quick Test," obtaining an IQ of 45. Dr. Cuneo reported that in April 1998, the defendant was administered the Stanford-Binet Intelligence Scale-Fourth Edition and obtained an IQ of 49. He stated that the defendant's current scores were consistent with his past intellectual assessments.

¶ 5 Dr. Cuneo reported that, intellectually, the defendant was functioning at the bottom end of the Mild Mentally Retarded Range of Intelligence based upon his performance of the Wechsler Adult Intelligence Scale–III, obtaining a full scale IQ of 56. His performance placed him in the bottom .4 percentile intellectually, meaning he was functioning at the cognitive level of a nine-year-old. Dr. Cuneo stated that the defendant read at the first grade level, had difficulty doing even simple addition or subtraction

[1]At the time of this court's order, predatory criminal sexual assault of a child is defined in section 11-1.40 of the Criminal Code of 2012. 720 ILCS 5/11-1.40 (West 2016).

problems, and had "grossly impaired" long and short term memory. Dr. Cuneo noted that the defendant did not initially understand the adversarial roles in court and that he thought that his friends were trying to put him in jail. Dr. Cuneo also reported that, although the defendant first indicated that he understood that the fitness assessment would be shared with the public defender, state's attorney, and judge, when asked to explain it in his own words, he was unable to do so.

¶ 6 Dr. Cuneo stated that the defendant was taking two psychotropic medications, Risperdal and Remeron. Dr. Cuneo opined that the defendant's mental illnesses, recurrent depression and mild mental retardation, substantially impaired his ability to understand the nature and purpose of the proceedings against him and his ability to assist in his own defense. Dr. Cuneo concluded that the defendant was unfit to stand trial, but if he were provided with a course of inpatient psychiatric treatment and stabilized on psychotropic medication, there is a substantial probability that he would be able to attain fitness within one year.

¶ 7 On March 3, 2010, the defendant was found unfit to stand trial. On March 17, 2010, he was transported to the DHS for treatment to restore his fitness.

¶ 8 In an August 23, 2010, report, DHS physician Dr. Kanwal Mahmood found that the defendant was fit to stand trial with treatment.[2] Dr. Mahmood noted that the

[2]The record contains a manila envelope marked "DHS Report–8-23-10." Inside are two nearly identical DHS reports. Both DHS cover letters are dated August 18, 2010, but they are stamped with different filing dates. The primary difference between these reports is that the one filed with the court on August 30, 2010, was accompanied by a cover letter stating that the defendant "remain[ed] unfit to stand

defendant described the role of a judge as "to sentence you in a bench trial" and described a plea bargain as "making a deal for a lesser charge." He also described the role of the state's attorney, the role of a defense attorney, and a jury trial. Dr. Mahmood stated that the defendant knew that a plea of not guilty meant "you are saying that you did not do the crime" and that it would lead to a jury trial. He told Dr. Mahmood that he wanted a jury trial.

¶ 9 Dr. Mahmood reported that the defendant was "on medication and doing better." The defendant was compliant with medications, taking 2 milligrams of risperidone twice a day for mood and psychotic symptoms, 500 milligrams of divalproex twice a day for mood stabilization, 40 milligrams of citalopram for depression, 1 milligram of cogentin twice a day for hand tremors, and temazepam for insomnia.

¶ 10 The defendant was diagnosed with depression with recurrent "Psychotic Features" and mild mental retardation. Dr. Mahmood reported that "[the defendant] gets anxious and when he gets anxious his answers come out wrong, but with prompting and reassurance he can get it right." In finding the defendant restored to fitness, on September 8, 2010, the court ordered that he was to be maintained on the medications from DHS, with no change in dosage or substitutions. The defendant was remanded to St. Clair County jail.

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trial." The other report, filed with the court on September 10, 2010, was accompanied by a cover letter stating that the defendant "[was] restored to fitness."

¶ 11 On March 16, 2011, the defendant entered into a negotiated guilty plea. The parties jointly recommended that he be sentenced to a 15-year term in the Illinois Department of Corrections, followed by 3 years' mandatory supervised release. At the hearing, the trial court admonished the defendant of the charge and sentence, and he indicated that he understood. In response to the court's inquiries, he stated that he did not wish to have a trial and that no one was forcing him to plead guilty. However, when the court asked him how he pled to the charge, he answered, "not guilty." After conferring off-record with his counsel, his counsel requested that the court repeat the inquiry. When the court asked again, the defendant replied, "guilty." The court asked if he was certain, and he stated that he was.

¶ 12 The court next informed the defendant that he had a right to have a presentence investigation (PSI) report prepared before he was sentenced. After conferring with his counsel off of the record, he told the court that he would like to waive that right. However, in response to the court's next inquiry, "[d]o you wish to have the report prepared?" the defendant replied, "[s]ure." Again, he and his counsel conferred off-record, and he then stated, "[n]o, sir." The court then sentenced him to the agreed-upon 15 years. The parties did not make a record as to whether he was being maintained on the correct psychotropic medicines and dosages.

¶ 13 During the sentencing hearing, the defendant's counsel stated that the parties were in agreement that the defendant should receive sentencing credit for the time he was in a DHS facility. In sentencing, the court did not mention credit for time spent awaiting sentencing. In the written judgment order, the court gave the defendant credit from the

date he was transported to DHS, March 17, 2010, to the day of sentencing, March 16, 2011.

¶ 14 The defendant did not move to withdraw his guilty plea or file a direct appeal. On March 4, 2014, he filed a *pro se* postconviction petition on a fill-in-the-blank style form. One of his claims alleged that his constitutional rights were substantially denied in that "THE DEFENDANT IS INCOMPATENT [*sic*] AND DID NOT UNDERST [*sic*] THE PROCEEDING IN COURT."

¶ 15 The trial court summarily dismissed the defendant's petition for failure to raise the gist of a constitutional claim. It noted that the defendant's claims were conclusory and that there were no "facts in the record that would support him being incompetent."

¶ 16 On appeal, the defendant argues that he stated the gist of a constitutional claim that his guilty plea was not knowing and voluntary, where his very low level of intelligence, grossly impaired memory function, psychotic problems, and his counsel's need to correct his answers off-record at the plea hearing cast doubt on his competence to waive his rights and plead guilty. In response, the State asserts, first, that because the defendant did not file a direct appeal, his postconviction issues are procedurally defaulted. In the alternative, it argues that his one-sentence claim of being "incompetent" was conclusory and did not present any arguable legal basis.

¶ 17 We disagree that the defendant forfeited this issue because he failed to raise it in a direct appeal. Both the Illinois Supreme Court and this court have found that, where a defendant does not file a direct appeal, the rule that a defendant cannot raise any issue in a postconviction petition that he could have made on direct appeal is inapplicable; the

Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2012)) provides a separate remedy, the availability of which is not contingent upon exhaustion of any other remedy. *People v. Rose,* 43 Ill. 2d 273, 279 (1969) (while mere trial errors may be waived, the defendant is still entitled to assert those constitutional rights that the Act is designed to protect and preserve); *People v. Tripp,* 248 Ill. App. 3d 706, 711 (1993) ("[T]he law is well settled that defendant does not waive the right to proceed under the Post-Conviction Hearing Act [citation] by failing to file a post-trial motion or a direct appeal."). The defendant's failure to directly appeal does not act as a waiver of constitutional issues properly brought under the Act, and thus his involuntary plea claim is not procedurally defaulted.

¶ 18 Turning to the merits of the defendant's claim, we agree that the trial court erred in summarily dismissing his postconviction petition, as it met the low threshold of stating the "gist" of a constitutional claim, and the record reflects some evidence that the defendant failed to understand the nature of his guilty plea.

¶ 19 The Act provides a three-stage process for the adjudication of postconviction petitions in noncapital cases. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). Postconviction proceedings are commenced by the filing of a petition, which clearly sets forth the respects in which petitioner's constitutional rights were violated. 725 ILCS 5/122-2 (West 2012). At the first stage, the trial court independently reviews and assesses the defendant's petition within 90 days of its filing, and if the court determines that the petition is "frivolous" or "patently without merit," the court can summarily dismiss it. 725 ILCS 5/122-2.1(a)(2) (West 2012); *Edwards*, 197 Ill. 2d at 244. A

petition is frivolous or patently without merit where it has no arguable basis in either fact or law, which means it is based on an indisputably meritless legal theory or a fanciful factual allegation. *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). An example of an indisputably meritless legal theory is one that is completely contradicted by the record. *Id*. at 17. This standard presents a low threshold requiring only that the defendant plead sufficient facts to assert an arguably constitutional claim. *People v. Brown*, 236 Ill. 2d 175, 184 (2010).

¶ 20 Although a *pro se* petition is not expected to set forth a complete and detailed factual recitation, it must set forth some facts that can be corroborated and are objective in nature or some explanation as to why those facts are absent. *Hodges*, 234 Ill. 2d at 10. At this stage, the defendant need not make legal arguments or cite to legal authority. *People v. Porter*, 122 Ill. 2d 64, 74 (1988). In postconviction proceedings, all well-pleaded facts are taken as true. *Brown*, 236 Ill. 2d at 183-84. Our review of the circuit court's dismissal of a postconviction petition is *de novo*. *Id.* at 184.

¶ 21 We find that the defendant met this low threshold when he complained of incompetence and of not understanding his court proceedings. Although the State correctly points out that the defendant did not refer to a particular proceeding in his petition or how he was incompetent, his petition nevertheless sets out the minimum facts necessary for him to claim that he did not understand his guilty plea proceedings, which is an arguably constitutional claim that his plea was not knowing and voluntary. The claim is corroborated by the record.

¶ 22 To enter a voluntary plea of guilty, a defendant must understand the nature of the proceedings against him and be competent to assist in his own defense. *People v. Shanklin*, 351 Ill. App. 3d 303, 306 (2004). Although many mentally retarded persons accused of crime are competent, we also know the mentally retarded have diminished capacity to understand and process information. *Id.* at 307. Thus, while in many cases, on-record plea admonishments will rebut a claim of an unknowing plea, here, the record contains evidence from both before and during the plea proceedings corroborating the defendant's allegation that he was incompetent and did not understand the nature of his guilty plea.

¶ 23 The record reflects that, at the time of the hearing, the defendant was mildly mentally retarded, meaning he was functioning at the cognitive level of a nine-year-old; he had "grossly impaired" long and short term memory; and, he needed to be maintained on psychotropic medications in order to be fit to stand trial. Both fitness examiners documented his struggles to understand basic courtroom procedures. In finding him restored to fitness, Dr. Mahmood warned that the defendant needed "prompting and reassurance" to get the "right" answer.

¶ 24 At the hearing, the trial court began with the traditional admonitions, which are paragraph-long explanations including words such as "penitentiary," "incrimination," and "intimidation." The purpose of such admonishments is to ensure that the defendant understands his plea, the rights he has waived by pleading guilty, and the consequences of his action. *People v. Lamar*, 2015 IL App (1st) 130542, ¶ 18. Although the defendant responded that he understood the admonishments, his limitations were well documented,

and he was not asked to explain his understanding in his own words. As Dr. Cuneo had reported that the defendant indicated understanding a concept but was then unable to relate it back in his own words, this is some evidence that the defendant possibly did not understand the rights he was forfeiting by pleading guilty.

¶ 25 Further, the defendant had to be "corrected" off-record twice: first, when he initially pled "not guilty" to the charge, and again when he replied "sure" to the court's inquiry about having a PSI report prepared. As the conversations wherein the defendant was convinced to change his answer occurred off-record, the court could not have known whether his attorney was explaining the process in simpler terms or simply telling him the "right" answer. We cannot ignore the possibility that the defendant was answering as expected when prompted, without understanding the consequences.

¶ 26 The defendant was not, and is not, incapable of pleading guilty. However, there is sufficient evidence in the record demonstrating that there was some confusion over the legal concepts at play during his plea proceedings. Taking "a lenient eye, [and] allowing borderline cases to proceed" (internal quotation marks omitted) (*Hodges*, 234 Ill. 2d at 21), we find that he met the low threshold of making an arguably constitutional claim that his plea was not knowing and voluntary. We therefore reverse and remand for second-stage postconviction proceedings, at which time the State may file a motion to dismiss.

¶ 27 As to the defendant's argument that the trial court erred in not giving him credit for time served between the date of his arrest and the date he was transported to a DHS facility, the State concedes that he is owed credit for that time served. Therefore, on remand, the mittimus should be amended to show that the defendant has been in

continuous custody since August 19, 2009, entitling him to an additional 207 days of presentence credit.

¶ 28 Reversed and remanded.