2022 IL App (4th) 200347-U

NO. 4-20-0347

FILED
February 1, 2022
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Vermilion County
WILLIAM WARD,	)	No. 18CF642
Defendant-Appellant.	)	
	)	Honorable
	)	Derek J. Girton,
	)	Judge Presiding.

PRESIDING JUSTICE KNECHT delivered the judgment of the court.
Justices Turner and Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court granted the Office of the State Appellate Defender's motion to withdraw as counsel and affirmed the circuit court's judgment as no issue of arguable merit could be raised on appeal.

¶ 2 Defendant, William Ward, appeals from the trial court's summary dismissal of his postconviction petition. On appeal, the Office of the State Appellate Defender (OSAD) moves to withdraw as counsel on the ground no issue of arguable merit can be raised. Defendant disagrees with OSAD's assessment of his appeal. We grant OSAD's motion and affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 In October 2018, defendant was charged by information with two counts of aggravated battery of a peace officer (720 ILCS 5/12-3.05(d)(4)) (West 2018)), Class 2 felonies subjected to mandatory Class X sentencing due to defendant's criminal history (730 ILCS

5/5-4.5-95(b) (West 2018)), and two counts of aggravated battery on a public way (720 ILCS 5/12-3.05(c) (West 2018)), Class 3 felonies eligible for extended term sentencing (730 ILCS 5/5-5-3.2(b)(1) (West 2018)).

¶ 5 The trial court appointed a public defender to represent defendant. While defendant was still being represented, he filed several *pro se* motions, including a motion for leave to proceed *pro se*. In December 2018, the appointed public defender filed a motion to withdraw as counsel, citing defendant's desire to represent himself. The court held a hearing on the motion the following month. After the court interviewed defendant to determine his fitness to proceed *pro se* and during the admonishments on the risks of proceeding *pro se*, defendant elected to withdraw his request and proceed with counsel.

¶ 6 On January 22, 2019, defendant pleaded guilty to one count of aggravated battery of a peace officer, subject to mandatory Class X sentencing. The plea was fully negotiated, and defendant agreed to a sentence of six years' imprisonment, consecutive to the sentence defendant was already serving, with three years mandatory supervised release (MSR). Defendant informed the trial court he had been diagnosed with paranoid schizophrenia and anxiety. He confirmed he was taking "psych meds," Remeron and Buspar but the medication did not affect his ability to think clearly and understand the proceedings. Defendant also agreed he had enough time to talk to his attorney and she had answered all of his questions.

¶ 7 The State presented the following as factual basis for the plea:

> "[I]f this matter were to proceed to trial, we would call Lieutenant Bonebright, Lieutenant Morrison, Lieutenant Campbell, Officers Rea, Strubberg and Talbott, as well as nurse Ross, who would testify on August 13th of 2018, the Defendant was an inmate at Danville Correctional. He was wearing a towel in the position of

> a V-shape on top of his head. He was given direct orders by staff to remove the towel and turn it over to him. When he was placed into restraints, he balled up his fist, punched Lieutenant Bonebright in the side of the face. OC spray was applied and he was then put into custody."

The court held the plea was knowingly and voluntarily made. Defendant was sentenced to six years' imprisonment and the court dismissed the remaining counts.

¶ 8 On June 22, 2020, defendant filed several *pro se* postplea motions. On the same day, defendant filed a postconviction petition pursuant to the Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/122-1 *et seq.* (West 2018)), alleging: (1) counsel was ineffective where she failed to (a) "send an investigator *** to take depositions from *** potential eyewitnesses," (b) allow him to plead "not guilty by reason of mental disease and mental defect" and move for a mental health examination, and (c) file a motion to dismiss extended-term sentencing; (2) the prosecutor was not authorized to practice law where he had not paid a $5000 bond fee; and (3) the Illinois Attorney General's office should have appointed a special prosecutor to prosecute his case as it involved a state official. Defendant attached to his petition a letter from the Illinois Secretary of State's office, stating it did not have any records pertaining to "[b]ond fees of Prosecutor Taylor of Vermillion [*sic*] County State's Attorney's Office."

¶ 9 On June 25, 2020, the trial court entered a docket entry denying defendant's postplea motions and dismissing defendant's postconviction petition. As to the postconviction petition, the court stated it did not "find grounds within the [defendant's] Post-Conviction Petition which would provide grounds to grant that petitions [*sic*]." Defendant appealed the dismissal of his postconviction petition.

¶ 10 This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 OSAD contends no meritorious argument can be made the trial court erred in summarily dismissing defendant's postconviction petition. OSAD points to four potential issues for review: (1) whether the trial court ruled on defendant's petition within 90 days of the date it was filed as required by the Postconviction Act, (2) whether there was merit to defendant's claims of ineffective assistance of counsel, (3) whether the prosecutor was authorized to practice law, and (4) whether the attorney general's office should have appointed a special prosecutor. Defendant disagrees with OSAD's assessment and additionally argues appellate counsel is ineffective for failing to raise his claims.

¶ 13 A. The Postconviction Act

¶ 14 The Postconviction Act provides a mechanism for a criminal defendant to challenge his conviction or sentence based on a substantial violation of federal or state constitutional rights. *People v. Morris*, 236 Ill. 2d 345, 354, 925 N.E.2d 1069, 1074-75 (2010). Proceedings under the Act are collateral in nature and not an appeal from the defendant's conviction or sentence. *People v. English*, 2013 IL 112890, ¶ 21, 987 N.E.2d 371. Once a defendant files a petition for postconviction relief, the trial court may, during the first stage of the proceedings, enter a dismissal order within 90 days if it finds the petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2018). "A post-conviction petition is considered frivolous or patently 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 quotation marks omitted.) *People v. Edwards*, 197 Ill. 2d 239, 244, 757 N.E.2d 442, 445 (2001). We review the trial court's summary dismissal of a postconviction petition *de novo*. *Id.* at 247.

¶ 15 B. Summary Dismissal

¶ 16 Section 122-2.1 of the Act provides, "[w]ithin 90 days after the filing and docketing of each [postconviction] petition, the court shall examine such petition and enter an order thereon," and if "the court determines the petition is frivolous and patently without merit, it shall dismiss the petition in a written order." 725 ILCS 5/122-2.1 (West 2018). Defendant filed his petition on June 22, 2020, and the trial court entered a docket entry on June 25, 2020, well within the 90-day period. Therefore, there is no meritorious argument the court procedurally erred in summarily dismissing defendant's postconviction petition.

¶ 17 C. Ineffective Assistance of Counsel

¶ 18 OSAD asserts it can make no colorable argument in support of defendant's claims of ineffective assistance of counsel.

¶ 19 To demonstrate ineffective assistance of counsel, a defendant must show counsel's (1) performance fell below an objective standard of reasonableness and (2) deficient performance resulted in prejudice to the defendant such that, but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). If a defendant fails to prove either prong of the *Strickland* test, his claim for ineffective assistance of counsel must fail. *People v. Sanchez*, 169 Ill. 2d 472, 487, 662 N.E.2d 1199, 1208 (1996). In the context of postconviction proceedings, "a petition alleging ineffective assistance 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." (Emphasis added.) *People v. Hodges*, 234 Ill. 2d 1, 17, 912 N.E.2d 1204, 1212 (2009).

¶ 20 1. *Investigating Potential Witnesses*

¶ 21 In his postconviction petition, defendant alleged counsel was ineffective by failing to "send an investigator *** to take depositions from *** potential eyewitnesses."

¶ 22 Because most postconviction petitions are drafted by *pro se* defendants, "the threshold for a petition to survive the first stage of review is low." *People v. Allen*, 2015 IL 113135, ¶ 24, 32 N.E.3d 615. The low threshold, however, "does not excuse the *pro se* [defendant] from providing factual support for his claims; he must supply factual basis to show the allegations in the petition are 'capable of objective or independent corroboration.' " *Id.* (quoting *People v. Collins*, 202 Ill. 2d 59, 67, 782 N.E.2d 195, 199 (2002)).

¶ 23 Section 122-2 of the Act provides a postconviction petition "shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2018). "The purpose of the 'affidavit, records, or other evidence' requirement is to establish that a petition's allegations are capable of objective or independent corroboration." *Hodges*, 234 Ill. 2d at10. The supporting material must (1) show "the petition's allegations are capable of corroboration" and (2) identify "the sources, character, and availability of evidence alleged to support the petition's allegations." *Allen*, 2015 IL 113135, ¶ 34. Our supreme court has found the failure to attach the necessary supporting material or explain its absence is "fatal" to a postconviction petition and alone "justifies the petition's summary dismissal." *Collins*, 202 Ill. 2d at 66; see also *Allen*, 2015 IL 113135, ¶ 26 (referring to a postconviction petition that fails to comply with section 122-2 as being "substantially incomplete").

¶ 24 Defendant did not attach any affidavit explaining the testimony these witnesses would have provided, nor did he offer any explanation for his failure to attach such evidence. In most cases where a claim of ineffective assistance based on counsel's failure to investigate or

call a witness is raised, in the absence of an affidavit from the proposed witness, "there can be no way to assess whether the proposed witness could have provided evidence that would have been helpful to the defense." *People v. Dupree*, 2018 IL 122307, ¶ 34, 124 N.E.3d 908. In this case, defendant did not specify who these proposed witnesses were, merely referring generally to "*potential* eyewitnesses." (Emphasis added.) Without supporting affidavits, defendant's claim trial counsel erred by failing to investigate and depose witnesses is without merit.

¶ 25 2. *Mental Health*

¶ 26 Defendant alleged counsel was ineffective for not allowing him to plead "not guilty by reason of mental disease and mental defect" and for not filing a motion for a mental health examination for defendant.

¶ 27 Section 113-4 of the Code of Criminal Procedure of 1963 (725 ILCS 5/113-4 (West 2018)) allows a defendant to plead "guilty, guilty but mentally ill, or not guilty." No plea option of "not guilty by reason of mental disease and mental defect" exists. As the plea defendant argues counsel should have allowed him to enter does not exist, it is not arguable counsel's performance was deficient for failing to enter it.

¶ 28 Defendant also did not provide evidence to support his claim counsel should have requested a mental health examination. Although defendant claimed in his petition he was suffering from posttraumatic stress disorder, paranoia, schizophrenia, and depression, he did not provide any supporting evidence his mental health impacted him at the time of the offense or during his proceedings. See *Collins*, 202 Ill. 2d at 66. Included in the record are several disconnected pages from Department of Corrections (DOC) mental health evaluations. According to a partial DOC psychiatric diagnostic evaluation report taken shortly before the instant offense and dated August 16, 2018, defendant was diagnosed with intermittent explosive

disorder, antisocial personality disorder, substance use disorder, posttraumatic stress disorder, and an "unspecified depressive disorder with anxious features." He was under treatment for these conditions. However, these disconnected pages from reports are insufficient to support his claims, as the documents are missing their full context.

¶ 29 At his plea hearing, defendant disclosed he was taking psychiatric medication, Remeron and Buspar, for paranoid schizophrenia and anxiety. He confirmed to the trial court the medication did not affect his ability to think clearly and understand the proceedings. He also confirmed he was thinking clearly on the day of the plea hearing and able to make important decisions about his case. Nothing in defendant's demeanor before the court indicated he was behaving irrationally. Without further evidence, which defendant did not supply, there is no indication defendant was unfit to plead guilty. As such, counsel was not arguably ineffective for not requesting a mental health evaluation.

¶ 30 3. *Extended-term Sentencing*

¶ 31 Defendant finally alleged his counsel was ineffective for failing to move to dismiss extended-term sentencing. OSAD inaccurately states defendant was not subject to extended-term sentencing. Defendant was originally indicted on two counts of aggravated battery of a peace officer, Class 2 felonies subject to Class X sentencing, and two counts of aggravated battery in a public way, Class 3 felonies eligible for extended-term sentencing. Although defendant was not sentenced under an extended-term sentencing scheme, he was eligible for extended-term sentencing prior to his plea. Defendant argues in his response he was not eligible for extended-term sentencing. In his original petition, defendant implied he would not have pleaded guilty if counsel had moved to dismiss extended-term sentencing. Despite OSAD's misstatement, there is no arguable merit to defendant's claim.

¶ 32 A defendant is eligible for extended term sentencing, as relevant to this case,

> "When a defendant is convicted of any felony, after having been previously convicted in Illinois or any other jurisdiction of the same or similar class felony or greater class felony, when such conviction has occurred within 10 years after the previous conviction, excluding time spent in custody, and such charges are separately brought and tried and arise out of different series of acts." 730 ILCS 5/5-5-3.2(b)(1) (West 2018).

Although defendant's criminal history is not included in the record before us, we take judicial notice of his record on the DOC website. See *Internet Inmate Search*, Illinois Department of Corrections, https://www.idoc.state.il.us/subsections/search/inms_print.asp?idoc=B46539 (last visited Jan. 6, 2021); see also *People v. Young*, 355 Ill. App. 3d 317, 321 n.1, 822 N.E.2d 920, 924 (2005) ("[W]e may take judicial notice of information that the Department of Corrections has provided on its website."). Defendant was convicted of aggravated battery with a firearm, a Class X felony, in Cook County case No. 01CR0069001; unlawful manufacture or delivery of cocaine, a Class 1 felony, in Cook County case No. 96CR2336401; and armed robbery, a Class X felony, in Cook County case No. 92C66155001. Defendant was admitted to DOC custody on June 28, 2004, where he has remained since. When calculating the 10 prior years, the court excludes any time spent in custody. 730 ILCS 5/5-5-3.2(b)(1) (West 2018). In other words, the 10-year period is a sum of the periods the defendant has spent out of custody. Although we do not have a complete record of his time spent in custody for his prior convictions, any qualifying conviction from at least 10 years prior to his admission in 2004 would be sufficient to support eligibility for extended term sentencing. As the charged offenses listed as eligible for extended term sentencing were Class 3 felonies (see 720 ILCS 5/12-3.05(h) (West 2018)), defendant's

prior convictions of aggravated battery, charged in 2001, and unlawful manufacture or delivery of cocaine, charged in 1996, would be sufficient to support eligibility for extended term sentencing. Therefore, any motion by counsel to dismiss extended term sentencing would have been meritless, and counsel cannot be ineffective for failing to file a futile motion. See *People v. Anderson*, 2013 IL App (2d) 111183, ¶ 65, 992 N.E.2d 539 (stating counsel was not ineffective for failing to file a meritless motion).

¶ 33 D. The Assistant State's Attorney and Execution of Bond Fees

¶ 34 Defendant alleged in his postconviction petition the prosecuting assistant state's attorney, Daniel Taylor, was not authorized to practice law where "he failed to pay the five thousand dollar bond fees that are required to be paid by all of the Illinois State's Attorneys within 20 days of him being elected into the office of the Vermillion [*sic*] County State's Attorney's Office." Defendant attached to his petition a letter from the Secretary of State's office, stating it "does not have any records" related to bond fees from Daniel Taylor.

¶ 35 Section 3-9001 of the Counties Code (55 ILCS 5/3-9001 (West 2018)) states, in pertinent part, before taking office, "[e]ach State's attorney shall *** execute a bond *** with good and sufficient securities in the penal sum of $5000, to be approved by the circuit court for the respective county." Section 3-9004 states if the bond is not paid "within twenty days after the person is declared elected, the office shall be deemed vacant." *Id.* § 3-9004.

¶ 36 However, this statute requires a bond from *elected* state's attorneys. Daniel Taylor was an assistant state's attorney, a hired position. Assistant state's attorneys are appointed by the state's attorney for their respective county, not elected by the general public. See 55 ILCS 5/4-2003 (West 2018). The bond provision does not apply. There is no meritorious argument Assistant State's Attorney Taylor was not authorized to prosecute defendant's case.

¶ 37 E. Special Prosecutor

¶ 38 Defendant argued in his petition the attorney general should have appointed a special prosecutor in his case "on the grounds that the alleged victim in this case is a state official and a[n] employee of the Illinois Department of Corrections."

¶ 39 It is the duty of the attorney general to "defend all actions and proceedings against any State officer, in his official capacity, in any of the courts of this State or the United States." 15 ILCS 205/4 (West 2018). The operative term in this case is "defend." The state officer in his official capacity in this case was the victim, not the defendant. Therefore, the attorney general's office was not obligated to take part in this case. Defendant's argument otherwise has no arguable merit.

¶ 40 F. Appellate Counsel

¶ 41 Finally, defendant contends his appellate counsel provided ineffective assistance by failing to pursue the issues which he believed are arguably meritorious.

¶ 42 "Claims of ineffective assistance of appellate counsel are measured against the same standard as those dealing with ineffective assistance of trial counsel." *People v. Childress*, 191 Ill. 2d 168, 175, 730 N.E.2d 32, 36 (2000). To prevail on a claim of ineffective assistance of counsel, a defendant must show (1) counsel's performance fell below an objective standard of reasonableness and (2) the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687.

¶ 43 Here, for the reasons addressed above, the record fails to disclose a single issue which is arguably meritorious. Further, defendant does not provide in his response any further legal authority or information to support his original claims. Accordingly, we reject defendant's claim of ineffective assistance of appellate counsel.

¶ 44 III. CONCLUSION

¶ 45 For the reasons stated, we agree no meritorious issue can be raised on appeal. We grant counsel's motion to withdraw as appellate counsel and affirm the trial court's judgment.

¶ 46 Affirmed.