2022 IL App (4th) 210445-U

NO. 4-21-0445

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
November 17, 2022
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
LATEEF R. THOMAS,	)	No. 16CF1376
Defendant-Appellant.	)	
	)	Honorable
	)	Roger B. Webber,
	)	Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Presiding Justice Knecht and Justice Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, finding the trial court did not err in summarily dismissing defendant's *pro se* postconviction petition at the first stage of proceedings.

¶ 2 Defendant, Lateef R. Thomas, appeals from the trial court's dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7) (West 2020)) at the first stage of proceedings. Defendant argues the petition presented the gist of a meritorious claim of ineffective assistance of counsel because trial counsel (1) failed to review the presentence investigation (PSI) report with him and (2) both trial and appellate counsel were ineffective for failing to raise viable sentencing issues on his behalf.

¶ 3 I. BACKGROUND

¶ 4 In October 2016, the State charged defendant with unlawful possession with intent to deliver a controlled substance containing cocaine (720 ILCS 570/401(a)(2)(A) (West

2016)) (count I) and unlawful possession with intent to deliver cannabis (720 ILCS 550/5(d) (West 2016)) (count II). In August 2017, the State also charged defendant with two counts of unlawful delivery of a controlled substance containing cocaine (720 ILCS 570/401(d) (West 2016)) (counts III and IV).

¶ 5 On November 28, 2017, the matter proceeded to jury trial. The State presented evidence showing law enforcement worked with a confidential informant (C/I) to coordinate two controlled buys from defendant on September 7, 2016, and September 23, 2016. Using the evidence gathered during the two controlled buys, a search warrant was obtained for defendant's residence. Upon executing the search warrant, law enforcement found a total of 16.3 grams of cocaine, $950 in cash, two jars containing cannabis, a digital scale, and a prescription pill bottle. Following deliberations, the jury acquitted defendant of unlawful possession with intent to deliver cannabis (count II) and found him guilty on the remaining three counts.

¶ 6 On January 5, 2018, defendant filed a motion for a new trial, alleging in part, the trial court erred when it (1) denied defendant's November 28, 2017, motion to dismiss, (2) denied defendant's motion *in limine* regarding the testimony in counts III and IV, (3) allowed the State to introduce video evidence collected by the C/I , and (4) denied defendant a fair trial by allowing admission of hearsay evidence. On January 8, 2018, the court held a hearing on defendant's motion for a new trial. After argument from both parties, the court denied defendant's motion.

¶ 7 The matter then proceeded to sentencing. The trial court inquired whether the State and defendant had received the PSI report. Defense counsel responded, "We likewise received it, and I sent a copy to my client. We have no corrections." The court then heard arguments from the parties concerning factors in aggravation and mitigation. The State

recommended a sentence in excess of 20 years, arguing "this [was] the Defendant's 5th conviction for possessing or dealing illegal drugs. *** This is his second Class X drug felony, his third Class 1 or greater felony for dealing drugs." Defense counsel argued for a sentence on the lower end of the sentencing range. Defense counsel further argued no weapons were found pursuant to the search warrant, characterizing defendant's drug dealing as "a very low-key, small operation." Defendant made a statement in allocution, asserting he did not receive a fair trial. Defendant questioned the reliability of the C/I and the video evidence admitted at trial. In closing, defendant stated, "Your Honor—I do have good work ethics [*sic*]. I have over 24—25 years of working at various restaurants, Your Honor." In pronouncing defendant's sentence the court noted,

> "In short, what I have when I review the presentence report and the history of prior employment, or, more accurately, the lack of any significant history of prior employment, [defendant] does say that he has a long history of working in restaurants, but he informed the probation office about two prior jobs, both of which—one of which he had for four years in lawn care service and one at a pizza facility for about ten months, which he indicates that he quit so that he could focus on his case.
>
> When I look at that, the total picture, what I see is a person who has made a choice that his primary source of income would be through dealing illegal drugs."

¶ 8 The trial court sentenced defendant to concurrent terms of 20 years' imprisonment for unlawful possession with intent to deliver a controlled substance containing cocaine (count I), 10 years' imprisonment for unlawful delivery of a controlled substance containing cocaine

(count III), and 10 years' imprisonment for unlawful delivery of a controlled substance containing cocaine (count IV). Defendant appealed, arguing (1) the court erred in denying his motion to dismiss counts III and IV based on the State's inability to produce a confidential informant and (2) the court improperly considered compensation as an aggravating factor. This court affirmed the trial court's judgment. *People v. Thomas*, 2020 IL App (4th) 180043-U, ¶¶ 54, 64.

¶ 9 On April 5, 2021, defendant filed a *pro se* postconviction petition. In the petition, defendant alleged, *inter alia*, trial counsel was ineffective for failing "to go over my pre-sentence report with me before sentencing" and failing to file a motion to reconsider sentence. The final paragraph of defendant's postconviction petition stated that "through experience when employment is asked, it[']s usually the most recent jobs. I humbly beg the court to forgive my error. If it please [*sic*] the court, I have enclosed a more accurate employment history." Defendant then provided his employment history from 1994 to 2017.

¶ 10 On June 29, 2021, the trial court entered a written order summarily dismissing defendant's postconviction petition as frivolous and patently without merit.

¶ 11 In its written order, the trial court addressed defendant's various ineffective assistance of counsel claims. Regarding defendant's claim trial counsel was ineffective for failing to review the PSI report with him, the court noted "[i]n determining whether counsel acted reasonably, this court may consider the '[p]revailing norms of practice as reflected in American Bar Association standards.' [*Strickland v. Washington*, 466 U.S. 668, 688 (1984)]." The court indicated the current American Bar Association standards for defense counsel provided,

> "If a presentence report is made available to defense counsel, counsel should seek to verify the information contained in it, and should supplement or challenge it if necessary. Defense counsel should either provide the client with a copy or (if copying is not allowed) discuss counsel's knowledge of its contents with the client. Criminal Justice Standards, Standard 4-8.3(e), A.B.A. (2017)."

The court then referenced trial counsel's statement at sentencing that he sent a copy of the PSI report to defendant and no corrections were needed, "thus satisfying professional standards." The court further noted, at the time of the sentencing hearing, defendant "raised no issue with counsel's handling of the [PSI report]." The court concluded defendant failed to show trial counsel's performance was ineffective or that defendant suffered prejudice as a result and determined defendant's claim was frivolous.

¶ 12 The trial court next addressed defendant's claim his trial counsel was ineffective for failing to file a motion to reconsider his sentence. The court noted defendant gave no indication he instructed trial counsel to file a motion to reconsider, nor did his petition contain "any facts demonstrating how trial counsel's omission to file a motion to reconsider has prejudiced the [defendant]." The court dismissed defendant's claim.

¶ 13 The trial court then addressed defendant's claim regarding his failure to provide a complete list of his employment history in the PSI report. The court concluded, " 'A party cannot invite an error by the trial court and then use it as a basis for appeal.' *Direct Auto Ins. Co. v. Bahena*, 2019 IL App (1st) 172918, ¶ 36."

¶ 14 On July 27, 2021, defendant sent a *pro se* letter to the trial court requesting an attorney be appointed to represent him.

¶ 15 This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 The 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 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).

¶ 18 The Act establishes a three-stage process for adjudicating a postconviction petition. *English*, 2013 IL 112890, ¶ 23. 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 2020). This is an independent assessment of the substantive merit of the petition. *People v. Harris*, 224 Ill. 2d 115, 126, 862 N.E.2d 960, 967 (2007). Our supreme court has held "a *pro se* petition seeking postconviction relief under the 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. 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.

¶ 19 "In considering a petition pursuant to [section 122-2.1 of the 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 2020). At the first stage of postconviction proceedings, a defendant only needs to present a "limited amount of detail" in his postconviction petition regarding the alleged constitutional violation. *People v. Brown*, 236 Ill. 2d 175, 188, 923 N.E.2d 748, 756 (2010); *People v. Gaultney*, 174 Ill. 2d 410, 418, 675 N.E.2d 102, 106 (1996). However, this does not mean a defendant is excused from providing any factual detail at all. *People v. Delton*, 227 Ill. 2d 247, 254, 882 N.E.2d 516, 520 (2008). 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. Moreover, we may affirm the dismissal of a postconviction petition on any basis supported by the record. *People v. Wright*, 2013 IL App (4th) 110822, ¶ 32, 987 N.E.2d 1051.

¶ 20 A. The PSI Report

¶ 21 Defendant contends he stated the gist of a constitutional claim his trial counsel was ineffective for failing to "review [defendant's] PSI [report] with him." The State argues the record positively rebuts defendant's contention trial counsel did not review the PSI report with him.

¶ 22 "It is well settled that defendant has a right to review and comment on matters contained in a presentence investigation report." *People v. Eddmonds*, 101 Ill. 2d 44, 64, 461 N.E.2d 347, 356-57 (1984). "It is clear that under Illinois law a presentence report is generally a reliable source for the purpose of inquiring into a defendant's criminal history." *People v. Tapia*, 2014 IL App (2d) 111314, ¶ 45, 3 N.E.3d 951. Moreover, "it is equally clear that '[a]ny claimed deficiency or inaccuracy within a presentence report must first be brought to the attention of the sentencing court, and a failure to do so results in waiver of the issue on review.' " (Emphases omitted.) *Tapia*, 2014 IL App (2d) 111314, ¶ 45 (quoting *People v. Williams*, 149 Ill. 2d 467,

493, 599 N.E.2d 913, 925 (1992)). A defendant has an obligation to notify the sentencing court if he believes the PSI report is deficient. *Tapia,* 2014 IL App (2d) 111314, ¶ 45.

¶ 23 This court analyzes ineffective assistance of counsel claims under the standard set forth in *Strickland,* 466 U.S. at 688. *People v. Evans,* 186 Ill. 2d 83, 93, 708 N.E.2d 1158, 1163 (1999). To obtain reversal under *Strickland,* a defendant must prove (1) counsel's performance failed to meet an objective standard of competence and (2) counsel's deficient performance resulted in prejudice to the defendant. *Evans,* 186 Ill. 2d at 93. To satisfy the deficiency prong of *Strickland,* the defendant must demonstrate counsel made errors so serious and counsel's performance was so deficient that counsel was not functioning as "counsel" guaranteed by the sixth amendment. *Evans,* 186 Ill. 2d at 93. Further, the defendant must overcome the strong presumption the challenged action or inaction could have been the product of sound trial strategy. *Evans,* 186 Ill. 2d at 93. To satisfy the prejudice prong, the defendant must prove a reasonable probability exists that, but for counsel's unprofessional errors, the proceeding's result would have been different. *Evans,* 186 Ill. 2d at 93.

¶ 24 Initially, we note defendant cites no authority for his argument counsel was "deficient for not reviewing the PSI with [defendant]." In fact, trial counsel represented to the court the following: "We likewise received it, and I sent a copy to my client. *We have no corrections.*" (Emphasis added.) In order to make such a representation to the trial court, trial counsel would have spoken to defendant to ascertain whether any corrections were needed with regard to the PSI report. In defendant's postconviction petition, defendant alleges his "trial lawyer James Dedmon failed to go over my pre-sentence report with me before sentencing," but defendant does not assert any deficiency or inaccuracy in support of the alleged error. Further, a review of the sentencing hearing reveals defendant was not shy about expressing his displeasure

with the trial, or the State's evidence, but made none of the claims now raised in his postconviction petition. Defendant's claim is positively rebutted by the record, and therefore, we find defendant did not state the gist of a claim for ineffective assistance of counsel.

¶ 25 B. Effective Assistance of Trial and Appellate Counsel

¶ 26 Defendant next argues he stated the gist of a constitutional claim his trial counsel and appellate counsel were ineffective for failing to raise viable sentencing issues on his behalf. Defendant concedes he did not specifically name appellate counsel nor allege appellate counsel's ineffectiveness in his postconviction petition. Our supreme court in *People v. Jones*, 213 Ill.2d 498, 505, 821 N.E.2d 1093, 1097 (2004), held any issue not raised in a postconviction petition may not be raised for the first time on appeal from the dismissal of the petition. Therefore, we decline to address defendant's claim of ineffective assistance of appellate counsel.

¶ 27 In his postconviction petition, defendant simply alleged "[trial counsel] failed to file a motion for reconsider [*sic*] of sentence." In his brief, defendant argues "[c]ounsel also has a duty to file a motion to reconsider sentence to preserve sentencing errors."

¶ 28 Defendant cannot show prejudice in this regard. On direct appeal, defendant argued he was deprived of a fair sentencing hearing because the trial court placed improper weight on compensation as an aggravating factor. *Thomas*, 2020 IL App (4th) 180043-U, ¶ 64. This court determined the issue forfeited. *Thomas*, 2020 IL App (4th) 180043-U, ¶ 64. However, we addressed defendant's claim under the doctrine of plain error. *Thomas*, 2020 IL App (4th) 180043-U, ¶ 63. Although we found the trial court erred when it considered compensation as an aggravating factor, we determined defendant could not establish plain error under either prong of the plain-error doctrine. We concluded the trial court reviewed defendant's PSI report and found defendant "lacked any significant history of employment." We determined that "[w]hile

defendant reported prior employment in restaurants to his probation officer, the court found defendant's 'primary source of income would be through dealing illegal drugs,' recognizing defendant lacked motivation to earn a living through legitimate means." *Thomas*, 2020 IL App (4th) 180043-U, ¶ 63. We further concluded, "[D]efendant was not deprived of a fair sentencing hearing where the trial court considered multiple factors in aggravation at sentencing. *** [T]he court relied upon defendant's criminal history, employment history, and deterrence." *Thomas*, 2020 IL App (4th) 180043-U, ¶ 64. Thus, defendant's claim of ineffective assistance is without merit under *Strickland* where the record affirmatively rebuts his claim he was prejudiced by trial counsel's failure to file a motion to reconsider sentence. See *People v. Bailey*, 364 Ill. App. 3d 404, 408, 846 N.E.2d 147, 151 (2006) (Counsel's failure to raise an issue in a motion to reconsider sentence only constitutes ineffective assistance where such failure prejudices defendant.). Here, defendant's criminal history, and the evidence of drug dealing—something his counsel could do nothing about—were significant factors unlikely to be outweighed by defendant's list of restaurant employment attached to his postconviction petition.

¶ 29 III. CONCLUSION

¶ 30 For the reasons stated, we affirm the trial court's judgment.

¶ 31 Affirmed.