2024 IL App (4th) 231438-U

NO. 4-23-1438

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
November 4, 2024
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Hancock County
MARVIN L. KIRBY,	)	No. 17CF139
Defendant-Appellant.	)	
	)	Honorable
	)	Rodney G. Clark,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Cavanagh and Justice Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in summarily dismissing defendant's petition for postconviction relief.

¶ 2 Defendant, Marvin L. Kirby, appeals the trial court's judgment summarily dismissing his petition for postconviction relief, arguing he presented the gist of a claim of ineffective assistance of counsel such that his petition should have been advanced to the second stage of proceedings. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On November 6, 2017, the State charged defendant with one count of aggravated criminal sexual abuse (720 ILCS 5/11-1.60(d) (West 2016)), and counsel was appointed the next day. The State filed its discovery disclosure on December 11, 2017. The State indicated that it

intended to call approximately 30 witnesses should the case proceed to trial, and it disclosed more than 60 items of evidence, consisting of both physical evidence and written and video-recorded statements made by defendant.

¶ 5 On December 12, 2017, the State charged defendant by way of a second amended information with seven counts of aggravated criminal sexual abuse (*id.*), alleging in each count that between July 1, 2017, and October 24, 2017, defendant, who was 17 years of age or older, sexually penetrated A.M.M. (born in November 2001) by placing his penis in her vagina. The same day the State filed its second amended information, defendant pleaded guilty to all counts after expressing his desire to plead guilty to the trial court. At the hearing, defendant informed the court that he had "been able to read everything" shown to him by counsel and had no questions about what he had reviewed. Defendant stated the only questions he had had prior to the hearing were answered by counsel and he was satisfied with the answers provided to him.

¶ 6 As a factual basis for the plea, the State indicated it would be able to produce certified copies of defendant's and A.M.M.'s birth certificates showing defendant was 36 years old during the relevant time period and A.M.M. was 15 years old. Members of the Hancock County Sheriff's Office would testify to responding to A.M.M.'s suicide on October 24, 2017, and subsequently executing search warrants for defendant's residence, the victim's residence, and cell phones located at both. The State would also introduce a recorded interview between defendant and Hancock County Sheriff Scott Bentzinger, during which defendant admitted he had had "an ongoing sexual relationship with A.M.M. and had sexually penetrated her vagina with his penis on at least seven different occasions." Letters and text messages between defendant and A.M.M. would verify the existence of a sexual relationship, and at least three witnesses would testify to knowing about the relationship. Lastly, the State would introduce lab

reports indicating A.M.M.'s DNA had been discovered on defendant's mattress and both defendant's and A.M.M.'s DNA had been discovered on a condom located in defendant's residence. The court found the factual basis sufficient and accepted defendant's pleas as knowing and voluntary.

¶ 7 On January 19, 2018, the trial court conducted a sentencing hearing. A presentence investigation report (PSI) was filed on January 10, 2018. Carla Bishop, who authored the PSI, testified at the hearing. The court ultimately sentenced defendant to 10 years' imprisonment on each count, with the sentences to be served consecutively, for a total of 70 years' imprisonment.

¶ 8 On February 1, 2018, defendant *pro se* filed a motion to withdraw his guilty plea, in which he alleged he received "inadequate representation by counsel." Counsel was appointed to assist defendant with his motion. In March 2019, defendant, through appointed postplea counsel, filed an amended motion to withdraw his guilty plea, arguing, in relevant part, the following:

> "It is the position of present counsel for the defendant that the original counsel's contact of less than one hour with the defendant outside of court, prior to the plea, the fact that the plea was entered a day after discovery being produced and with no opportunity to review the same with the client, the inaccurate representations made to the client by counsel as to the possible sentence, the complete lack of investigation into the client's mental state despite his recent release for psychiatric treatment, the lack of any discussion regarding potential defenses or any corroboration necessary regarding confessions, and finally the fact that the [PSI] was available for a week and only reviewed with the defendant,

> if at all, the night prior to sentencing, when taken in total constitute a [*prima facie*] case of ineffective assistance of counsel."

Following a hearing, the trial court denied defendant's motion. Defendant appealed, and the Third District entered an order remanding for further proceedings due to postplea counsel's failure to strictly comply with Illinois Supreme Court Rule 604(d) (eff. July 1, 2017). See *People v. Kirby*, 2021 IL App (3d) 190466-U. The Third District found that because some of the claims raised in defendant's motion concerned private communications between defendant and plea counsel that were "*dehors* the record, *** postplea counsel needed to provide an affidavit or other evidentiary support" to comply with the rule and adequately present defendant's claims. *Id.* ¶ 16.

¶ 9 On remand, defendant filed a second amended motion to withdraw his guilty plea, in which he again raised the same ineffective-assistance claims highlighted above. Defendant attached an affidavit to his motion, in which he averred that he "had no opportunity to review discovery with" plea counsel and plea counsel "never discussed with [him] the State's case in terms of the evidence they had to support any of the charges or what evidence would be necessary to support each charge." Defendant further averred that he did not "recall [plea counsel] going over the [PSI] which had been prepared appropriately [*sic*] one week prior" to sentencing. Following a hearing at which both defendant and plea counsel testified, the trial court denied defendant's motion, finding defendant had failed to establish any prejudice resulting from plea counsel's allegedly deficient performance. Defendant appealed, but he did not raise on direct appeal the ineffective-assistance claims now before us. See *People v. Kirby*, 2023 IL App (4th) 220879-U, ¶ 3.

¶ 10 On October 24, 2023, defendant filed a petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2022)), raising several claims of ineffective assistance of counsel. In relevant part, defendant first argued plea counsel rendered ineffective assistance because he "knew there was physical evidence for possibly one count but no more against defendant and failed to disclose this important information to defendant and advise further." According to defendant, had plea counsel "advised [him] of the actual physical evidence against him or lack thereof, [he] would not have accepted guilty pleas and would have insisted on a plea of not-guilty to all counts." Defendant further alleged that he "would have asked the court for time to go over the discovery with counsel in order to find out what else is not being disclosed to him." Next, defendant argued that plea counsel was ineffective for failing to review the PSI with him prior to sentencing to "address any issues such as falsehoods, erroneous claims, comments and/or quotes." Defendant alleged that there were "more than fifty erroneous statements" in the PSI and plea "counsel's failure to bring the many errors in the PSI to the attention of the court and request that the errors be corrected and the PSI resubmitted to the court *** proved to be ineffective." Defendant attached an affidavit to his petition that essentially mirrored the affidavit he had attached to his second amended motion to withdraw his guilty plea.

¶ 11 On November 14, 2023, the trial court entered a written order summarily dismissing defendant's postconviction petition. The court found that defendant's ineffective-assistance claims were "*res judicata*, waived and more importantly, frivolous and patently without merit."

¶ 12 This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 On appeal, defendant argues the trial court erred in summarily dismissing his postconviction petition because he presented the gist of a claim that plea counsel was ineffective for (1) failing to review discovery with him and inform him that the State had physical evidence supporting only one of the charged counts and (2) failing to review the PSI with him prior to sentencing to bring any errors contained therein to the court's attention. According to defendant, these "arguments rely on evidence and claims that were outside of the record on direct appeal, could not have been raised in that proceeding, and plead the gist of a constitutional claim of ineffective assistance of counsel." The State disagrees, arguing the court was correct in dismissing defendant's petition where his claims were barred by *res judicata* or forfeiture, unsupported by the record, and failed to make an arguable showing of prejudice. We review the summary dismissal of a postconviction petition *de novo*. *People v. Edwards*, 197 Ill. 2d 239, 247 (2001).

¶ 15 The Act provides a method for criminal defendants to "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. Hodges*, 234 Ill. 2d 1, 9 (2009) (citing 725 ILCS 5/122-1 *et seq.* (West 2006)). A defendant initiates postconviction proceedings by filing a petition that must, among other things, "clearly set forth the respects in which [the] petitioner's constitutional rights were violated." 725 ILCS 5/122-2 (West 2022). At the first stage of proceedings, "the trial court independently determines, without input from the State and within 90 days after the filing and docketing of the petition, whether the petition is frivolous or is patently without merit." (Internal quotation marks omitted.) *People v. Anderson*, 2015 IL App (2d) 140444, ¶ 11. Our supreme court has held "that the phrase 'frivolous or *** patently without merit' encompasses *res judicata* and forfeiture." *People v. Blair*, 215 Ill. 2d 427, 445 (2005).

Thus, "[i]n an initial postconviction proceeding, the common law doctrines of *res judicata* and [forfeiture] operate to bar the raising of claims that were or could have been adjudicated on direct appeal." *Id.* at 443; see *id.* at 443-44 (noting that "*res judicata* bars consideration of issues that were previously raised and decided on direct appeal" and forfeiture "mean[s] issues that could have been raised, but were not, and are therefore barred").

¶ 16 "At the first stage of postconviction proceedings under the Act, 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." *Hodges*, 234 Ill. 2d at 17; see *Strickland v. Washington*, 466 U.S. 668 (1984) (articulating the two-pronged standard for claims of ineffective assistance of counsel). Challenges to guilty pleas alleging ineffective assistance of counsel are likewise subject to the *Strickland* standard. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). "Counsel's conduct is deficient under *Strickland* if the attorney failed to ensure that the defendant entered the plea voluntarily and intelligently." *People v. Rissley*, 206 Ill. 2d 403, 457 (2003). To establish prejudice, "the defendant must show there is a reasonable probability that, absent counsel's errors, the defendant would have pleaded not guilty and insisted on going to trial." *People v. Hall*, 217 Ill. 2d 324, 335 (2005). "A bare allegation that the defendant would have pleaded not guilty *** is not enough to establish prejudice. [Citation.] Rather, the defendant's claim must be accompanied by either a claim of actual innocence or the articulation of a plausible defense that could have been raised at trial." *Id.* at 335-36.

¶ 17 Here, we agree with the trial court and the State that defendant forfeited the ineffective-assistance claims he now contends should have been advanced to the second stage of postconviction proceedings, as it is clear from the record that those claims could have been, but

were not, raised on direct appeal. In 2019, defendant filed an amended motion to withdraw his guilty plea. In relevant part, defendant argued plea counsel was ineffective for failing to review discovery with him and discuss "potential defenses or any corroboration necessary regarding confessions." He also argued plea counsel was ineffective where "the [PSI] was available for a week and only reviewed with the defendant, if at all, the night prior to sentencing." The trial court denied defendant's motion, and defendant appealed. On appeal, the Third District found that these claims were "*dehors* the record," and it remanded for the specific purpose of having postplea counsel provide "an affidavit or other evidentiary support" for the claims. *Kirby*, 2021 IL App (3d) 190466-U, ¶ 16. On remand, defendant attached an affidavit to his motion, and the court conducted a hearing, at which both defendant and plea counsel testified. The court again denied defendant's motion, and defendant appealed. However, defendant did not assert on direct appeal the claims he now contends should have been advanced to the second stage of postconviction proceedings. See *Kirby*, 2023 IL App (4th) 220879-U, ¶ 3.

¶ 18 Based on the above, it is clear from the record that defendant not only asserted the instant claims previously, but he was even given the opportunity, while represented by postplea counsel, to support them with the necessary evidentiary support. As noted by the State, defendant failed to establish prejudice upon remand following his appeal to the Third District, which is likely why appellate counsel did not raise these claims on direct appeal. See, *e.g.*, *People v. Smith*, 195 Ill. 2d 179, 190 (2000) (noting that appellate counsel may "refrain from raising issues which, in his or her judgment, are without merit"). Accordingly, because it is clear from the record that defendant could have addressed the denial of his claims of ineffective assistance of counsel on direct appeal but failed to do so, we find his claims are barred by the common law doctrine of forfeiture. See *Blair*, 215 Ill. 2d at 443.

¶ 19 We note that an exception to the forfeiture doctrine may allow an otherwise barred claim to proceed "where facts relating to the claim do not appear on the face of the original appellate record." *Id.* at 450-51. Defendant contends this exception applies to his postconviction claims because they "were missing essential facts until those facts were set forth in the post-conviction petition and the accompanying affidavit." Specifically, defendant argues that because he alleged prejudice for the first time in his postconviction petition, the doctrine of forfeiture does not operate to bar his claims. However, nothing prevented defendant from alleging prejudice earlier, either in the trial court or on direct appeal. Moreover, even if we agreed with defendant's contention, which we do not, he has failed to explain why these "missing essential facts" could not have been presented on remand from the initial denial of his motion to withdraw his guilty plea. The Third District explicitly provided defendant with an opportunity to fully develop his claims, instructing that "postplea counsel needed to provide an affidavit or other evidentiary support" for them. *Kirby*, 2021 IL App (3d) 190466-U, ¶ 16. Given that defendant was represented by postplea counsel, he presumably had access to the discovery materials and the PSI. In addition, the trial court conducted a hearing on his second amended motion, and both defendant and plea counsel testified at the hearing. Defendant could have questioned plea counsel about the discovery materials and the information contained in the PSI at the hearing on his motion to withdraw his guilty plea, but he failed to do so. Thus, we find defendant was given ample opportunity to fully develop his claims in the trial court and raise them on direct appeal, and we reject his argument that an exception to the doctrine of forfeiture applies.

¶ 20 III. CONCLUSION

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

¶ 22 Affirmed.