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2012 IL App (3d) 100563-U

Order filed May 4, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 13th Judicial Circuit,
Plaintiff-Appellee,)	Bureau County, Illinois,
)	
v.)	Appeal No. 3-10-0563
)	Circuit No. 07-CF-42
)	
SENAKA PALMER,)	Honorable
)	Marc P. Bernabei,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Carter and Lytton concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant's postconviction petition for ineffective assistance of appellate counsel, relating to counsel's failure to raise issues on direct appeal, was properly dismissed as frivolous and patently without merit.
- ¶ 2 Following a bench trial, defendant, Senaka Palmer, was convicted of unlawful delivery of a controlled substance (720 ILCS 570/401(c)(2) (West 2006)) and sentenced to 13½ years' imprisonment. Defendant appeals the denial of his postconviction petition, arguing that he presented the gist of a claim for ineffective assistance of appellate counsel. We affirm.

FACTS

¶ 3

¶ 4 On June 8, 2007, defendant was charged by indictment with unlawful delivery of a controlled substance. 720 ILCS 570/401(c)(2) (West 2006). The charge alleged that on May 18, 2007, defendant knowingly delivered more than 1 but less than 15 grams of cocaine. Defendant's wife, Michelle Palmer, was also charged in relation to this incident, and their cases were consolidated.

¶ 5 Prior to trial, the court informed the parties that court files, including Michelle's and seven other files, had gone missing from the public defender's office. On several occasions, defense counsel informed the court that none of defendant's files were missing. After the stolen files were recovered by the police, defense counsel reviewed the files and advised the court that he saw nothing pertinent to defendant's case.

¶ 6 Between September 2007 and March 2008, Michelle filed multiple motions to continue. Defense counsel agreed to them to ensure that the cases would be tried together. Before allowing each continuance, the trial court questioned defendant in great detail about his agreement to the continuances and the waiver of his speedy trial right. Following the admonishments, defendant personally agreed to each continuance.

¶ 7 On November 17, 2007, the State requested a continuance to secure the presence of a chemist that the State found to be a necessary witness. In order to allow the continuance, the State suggested that the court release defendant on a personal recognizance bond. After discussing this with the court, defendant personally agreed to the continuance and the personal recognizance bond.

¶ 8 On September 30, 2008, the cause proceeded to a bench trial. The parties stipulated that

the substance that was recovered weighed 7.6 grams and was in fact cocaine. Defendant personally signed the written stipulation and also agreed to the stipulation in open court.

¶ 9 Although there were some inconsistencies in the witnesses' testimony regarding the sequence of events that took place on May 18, 2007, the evidence tended to show that Lieutenant Tim Trevier arranged for Bethany Morris and police officer Michael Hammen to coordinate an undercover drug buy from defendant and Michelle. Morris had previously purchased cocaine from the Palmers, so in exchange for reducing her burglary charge to misdemeanor theft she had agreed to arrange the drug buy. Morris previously used cocaine, but it had been over a year since her last use.

¶ 10 Morris called defendant on May 17, 2007, and asked if he could get her an ounce of cocaine, and defendant agreed. Morris called defendant again on May 18, 2007, where defendant agreed to meet her in Walnut, Illinois. Defendant told Morris that it would cost \$700 for an ounce of cocaine.

¶ 11 Morris went with Hammen to Walnut to meet defendant. Prior to meeting with defendant, Michelle called Morris and told her that the car had broken down and that they would meet just outside of town on Route 92. When Morris and Hammen arrived, they saw a white car with the hood up. Defendant, Michelle, and Kevin Sodaro were standing next to the car. Morris pulled over, and defendant walked up to the car. Defendant told Hammen that "it" was down in the ditch over by the sign. Hammen walked a few feet down a little hill and picked up a green Newport cigarette pack.

¶ 12 Hammen opened the cigarette pack and saw a white powdery substance¹ that he

¹ The State's exhibit showed the substance to be in rock form.

determined was cocaine. Hammen testified that he tried to examine the cocaine more closely, but defendant was making him nervous, and he did not want to jeopardize his safety. Hammen walked back from the ditch and gave defendant \$750 for the cocaine and \$10 for gas. Hammen asked defendant if he could get him more, and defendant said yes. Defendant, Michelle, and Sodaro left the scene in the white car and headed toward defendant's residence in Rock Falls. Then Hammen and Morris left and delivered the cocaine to Trevier. Trevier determined the cocaine was short when it weighed only 9 grams.

¶ 13 Morris called both defendant and Michelle after the deal to get the remainder of the cocaine. After multiple phone calls, defendant and Michelle stated they would bring 5 grams of cocaine to the same location that afternoon. Prior to the second meeting, the white vehicle drove past the designated location. Trevier stopped the car and arrested defendant, Michelle, and Sodaro. Police officers searched the white car, but did not find any currency, drugs, or other contraband. Defendant told Trevier that he wanted to make a deal, but Trevier told him they could talk at the jail.

¶ 14 Both defendant and Michelle did not testify at trial. At the close of the evidence, the trial court found defendant guilty and sentenced him to 13½ years' imprisonment. On direct appeal, this court affirmed defendant's conviction and sentence, but awarded him presentence incarceration credit. *People v. Palmer*, No. 3-08-1036 (2010) (unpublished order under Supreme Court Rule 23).

¶ 15 On July 6, 2010, defendant filed a *pro se* postconviction petition, wherein he alleged that appellate counsel was ineffective for failing to raise on direct appeal that: (1) some files were stolen; (2) he was denied effective assistance of trial counsel; and (3) the State failed to prove

him guilty beyond a reasonable doubt. Regarding defendant's claim of ineffective assistance of trial counsel, defendant alleged that trial counsel: (1) failed to object to the State's leading questions; (2) coerced him into agreeing to continuances by the State and Michelle; (3) failed to file a motion to sever; and (4) agreed to a stipulation that the substance recovered was cocaine, which was against his wishes.

¶ 16 The trial court dismissed defendant's petition as frivolous and patently without merit. Defendant appeals.

¶ 17 ANALYSIS

¶ 18 On appeal, defendant alleges his postconviction petition stated the gist of a claim for ineffective assistance of appellate counsel because counsel failed to raise multiple issues on direct appeal.

¶ 19 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2008)) provides a three-stage process for the adjudication of postconviction petitions in noncapital cases. *People v. Hodges*, 234 Ill. 2d 1 (2009). At the first stage, the trial court must independently determine whether the petition is "frivolous or is patently without merit[.]" 725 ILCS 5/122-2.1(a)(2) (West 2008). The petition's allegations, liberally construed and taken as true, need only present the gist of a constitutional claim. *People v. Harris*, 224 Ill. 2d 115 (2007). We review the first-stage dismissal of a postconviction petition *de novo*. *People v. Morris*, 236 Ill. 2d 345 (2010).

¶ 20 A postconviction petition alleging ineffective assistance of counsel may not be summarily dismissed at the first stage if it is at least arguable that: (1) counsel's performance was so deficient that it fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced defendant's case. *Strickland v. Washington*, 466 U.S. 668 (1984); *People*

v. Petrenko, 237 Ill. 2d 490 (2010). Appellate counsel is not incompetent for failing to raise every conceivable issue on direct appeal because, unless the underlying issue is meritorious, defendant is not prejudiced from counsel's failure to raise it. *People v. Edwards*, 195 Ill. 2d 142 (2001).

¶ 21 In the instant case, defendant alleges multiple issues that appellate counsel failed to raise on direct appeal. Upon review of the record and defendant's petition, we do not find any of the issues defendant raised meritorious; therefore, defendant was not prejudiced by counsel's failure to raise the following issues on direct appeal. See *Edwards*, 195 Ill. 2d 142.

¶ 22 I. Stolen Files

¶ 23 Defendant claims that he was denied a fair trial because his trial counsel did not have possession of stolen files. Despite defendant's argument, the record reveals that defense counsel never lost any part of defendant's file. *People v. Rogers*, 197 Ill. 2d 216 (2001) (a petition contradicted by the record is frivolous and patently without merit). Furthermore, defense counsel reviewed the files that were recovered by the police and confirmed that nothing was pertinent to defendant's case. As such, there was nothing for appellate counsel to raise on direct appeal.

¶ 24 II. Sufficiency of the Evidence

¶ 25 Defendant claims that the State did not prove defendant guilty beyond a reasonable doubt of unlawful delivery of cocaine because Hammen and Morris were not credible, and there were inconsistencies in the other officers' testimony.

¶ 26 When considering a challenge to the sufficiency of the evidence, a court of review must decide whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable

doubt. *People v. Beauchamp*, 241 Ill. 2d 1 (2011). It is well settled that a reviewing court should not reverse a criminal conviction for lack of sufficient evidence unless the evidence is so palpably contrary to the verdict or so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of guilt. *People v. Collins*, 106 Ill. 2d 237 (1985). Here, the State was required to prove that defendant unlawfully delivered more than 1 but less than 15 grams of a substance containing cocaine. See 720 ILCS 570/401(c)(2) (West 2006).

¶ 27 Although there were some inconsistencies in the testimony presented at trial, we do not believe that the testimony was so improbable or unsatisfactory to justify a reasonable doubt of defendant's guilt. See *Collins*, 106 Ill. 2d 237. For instance, Hammen's description of the cocaine as a powdery substance, which was inconsistent with its appearance as an exhibit, may have resulted from his not taking it out of the cigarette pack to examine. Additionally, even though Morris participated in the undercover drug buy in exchange for a reduction in her burglary charge, her testimony was corroborated by other officers. Accordingly, we find that the evidence was sufficient to convict defendant of delivery of cocaine beyond a reasonable doubt; therefore, appellate counsel was not ineffective for failing to raise this claim on appeal.

¶ 28 III. Ineffective Assistance of Trial Counsel

¶ 29 As to the claim that trial counsel should have objected to the State's leading questions, defendant does not assert which questions were leading, which witnesses were subject to leading questions, or how he was prejudiced by the leading questions. *People v. C.H.*, 237 Ill. App. 3d 462 (1992) (counsel is not ineffective for failing to object to leading questions absent a showing of prejudice). However, even if some leading questions were used, absent some indication in the record to the contrary, a trial judge in a bench trial is presumed to have considered only

competent evidence. *People v. Naylor*, 229 Ill. 2d 584 (2008).

¶ 30 Defendant's claim that trial counsel coerced him into agreeing to continuances for the State and Michelle also fail. The record reveals that after each continuance, the trial court questioned defendant at great length to determine his acquiescence with the request, and defendant personally agreed to each continuance. *People v. Torres*, 228 Ill. 2d 382 (2008) (allowing dismissal of petition when the allegations are contradicted by the record).

¶ 31 Defendant's claim that trial counsel failed to sever his trial from Michelle's trial because he may have wanted to assert an antagonistic defense does not show how he was prejudiced by the joint trial. A court may sever a joint trial if a defendant may be denied his right to confrontation or where the codefendants have antagonistic defenses. *People v. Dat Tan Ngo*, 388 Ill. App. 3d 1048 (2008). Here, defendant merely asserts that he was denied the right to confrontation. However, at trial, neither defendant nor Michelle testified. *Id.* (a defendant is denied his right to confrontation when the codefendant has made hearsay admissions that implicate defendant). Furthermore, defendant merely claims he and Michelle may have had antagonistic defenses; however, actual hostility between the two defenses is required. *Id.* (defenses are antagonistic when each codefendant implicates the other in the offense and professes his own innocence).

¶ 32 Defendant further claims that trial counsel agreed to a stipulation that the controlled substance was cocaine, which was against his wishes. This claim must also fail. The record reveals that defendant personally signed the stipulation. Furthermore, defendant is unable to overcome the presumption that counsel stipulated to the controlled substance as part of trial strategy, where the focus of the trial was whether defendant delivered the cocaine. See *People v.*

Smith, 326 Ill. App. 3d 831 (2001).

¶ 33 Accordingly, we hold that defendant's postconviction allegations, liberally construed, did not make a claim for ineffective assistance of appellate counsel; therefore, defendant's petition was properly dismissed. See *Petrenko*, 237 Ill. 2d 490.

¶ 34 CONCLUSION

¶ 35 For the foregoing reasons, the judgment of the circuit court of Bureau County is affirmed.

¶ 36 Affirmed.