

NOTICE
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2012 IL App (4th) 100942-U

Filed 5/25/12

NO. 4-10-0942

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
LAVAR J. WARE,)	No. 06CF145
Defendant-Appellant.)	
)	Honorable
)	Kevin P. Fitzgerald,
)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Turner and Justice Steigmann concurred in the judgment.

ORDER

- ¶ 1 *Held:* Because defendant failed to state the gist of a meritorious claim of a constitutional violation, the trial court was correct to summarily dismiss his postconviction petition after a first-stage review.
- ¶ 2 Defendant, Lavar J. Ware, who is serving a 17-year prison sentence for one count of unlawful delivery of a controlled substance (720 ILCS 570/401(d) (West 2006)), appeals from the trial court's summary dismissal of his *pro se* postconviction petition. Pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), the office of the State Appellate Defender has moved to withdraw from representing defendant, because in OSAD's opinion, it would be impossible to make a reasonable argument in support of this appeal. OSAD forwarded a copy of its motion to withdraw and accompanying memorandum of law to defendant. On this court's own motion, we allowed defendant the opportunity to file additional points and authorities by March 30, 2012, and he has not done so.

¶ 3 After considering defendants' arguments presented in his postconviction petition, we agree with OSAD's assessment of the merits of this appeal. The trial court was correct to dismiss defendant's petition as frivolous and patently without merit. Therefore, in our *de novo* review (*People v. LaPointe*, 365 Ill. App. 3d 914, 923 (2006)), we grant OSAD's motion for withdrawal, and we affirm the trial court's judgment.

¶ 4 In February 2006, the Bloomington police department utilized a confidential source to purchase cocaine from defendant. Defendant was arrested after the transaction and his apartment was searched. The police found items "indicative of cocaine packaging." A jury found defendant guilty of unlawful delivery of a controlled substance (720 ILCS 570/401(d) (West 2006)), a Class 2 felony. However, because of defendant's prior convictions, the trial court sentenced him as a Class X offender. See 730 ILCS 5/5-5-3(c)(8) (West 2006). The court sentenced him to 17 years in prison and imposed a drug-treatment assessment of \$3,000—the amount to be assessed for a Class X felony (720 ILCS 570/411.2(a)(1) (West 2006)). According to section 411.2(a)(3) of the Illinois Controlled Substances Act (720 ILCS 570/411.2(a)(3) (West 2006)), \$1,000 was the amount of the drug-treatment assessment to be imposed for a Class 2 felony.

¶ 5 Defendant appealed. This court reduced the drug assessment from \$3,000 to \$1,000 but otherwise affirmed defendant's conviction and sentence. *People v. Ware*, No. 4-07-1074 (Oct. 20, 2008) (unpublished order under Supreme Court Rule 23).

¶ 6 In his postconviction petition, filed in July 2010, defendant raised what appeared to be 12 separate claims, each to be discussed individually. Six of the 12 claims alleged defendant's trial counsel was ineffective for failing to (1) introduce evidence, (2) present witnesses, (3) challenge the search incident to his arrest, (4) cross-examine the confidential source regarding

whether he was paid for his services, (5) allow him to stand trial when he was unfit to do so, and (6) move to suppress his statements made to the police. However, defendant failed to provide any details relating to these claims and instead made merely conclusory accusations.

¶ 7 Defendant did not identify the evidence or the witnesses (with the exception of identifying his mother as a potential witness) he believed counsel should have presented, nor did he explain how these errors affected his trial. On the fitness issue, we note that our review of the record indicated that trial counsel filed several motions for a fitness examination and that those examinations were performed. In fact, defendant was deemed unfit to stand trial on at least one occasion. However, the latest fitness examination revealed defendant was fit to stand trial and, relying on that information, the trial court found that defendant had been restored to fitness. In his postconviction petition, defendant failed to allege any further information regarding this fitness issue that would otherwise challenge the propriety of the fitness decisions.

¶ 8 Our review of the record further indicated that one of the police officers testified at trial that the confidential source had, indeed, been paid for his services, rendering defendant's claim as to this issue without merit. Additionally, any motion to suppress defendant's statement made to the police would have been unsuccessful, as the only statement he made was exculpatory, as he denied selling drugs. He did not make any statement that could have reasonably been used against him.

¶ 9 After reviewing these ineffective-assistance-of-counsel claims made by defendant, OSAD opined that each was either too vague, conclusory, or frivolous to effectively state the gist of a constitutional violation in accordance with the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). We agree.

¶ 10 As his seventh claim, defendant alleged the trial court erred by admitting the surveillance videotape in evidence, claiming it had no evidentiary value. The video showed defendant and the confidential informant entering and exiting defendant's apartment. Such evidence did not prejudice defendant and he does not otherwise explain how the introduction of this evidence jeopardized his constitutional rights.

¶ 11 As his eighth claim, defendant challenged the sufficiency of the evidence, claiming the confidential informant was not a credible witness due to his criminal history and drug use. Because the State presented other evidence of defendant's guilt, it is unlikely the credibility of the informant was a determinative factor in the jury's verdict. The evidence presented at trial demonstrated that the marked bills the confidential informant used during the transaction were found on defendant's person after the transaction and during the search incident to his arrest. Based on this evidence, defendant's claim on this issue is without merit.

¶ 12 As his ninth claim, defendant argued his sentence violated the proportionate penalties clause in that the sentencing statute required a lengthy sentence contrary to the goal of restoring offenders to useful citizenship. Defendant was convicted of a Class 2 felony. However, due to his criminal history, he was sentenced as a Class X offender pursuant to section 5-5-3(c)(8) of the Unified Code of Corrections (730 ILCS 5/5-5-3(c)(8) (West 2006)). The range of punishment for a Class X offender is between 6 and 30 years in prison. 730 ILCS 5/5-8-1(a)(3) (West 2006)). The trial court sentenced defendant to 17 years, a term within the applicable range. Illinois courts have consistently upheld the constitutionality of the statute providing mandatory Class-X sentencing. See *People v. Hill*, 345 Ill. App. 3d 620, 635 (2003). Further, this court addressed and rejected defendant's excessive-sentence argument in his direct appeal. See *People v. Ware*, No. 4-07-1074

at 7. Accordingly, defendant's argument would not be successful.

¶ 13 As his tenth claim, defendant raised a *Krankel* issue (see *People v. Krankel*, 102 Ill. 2d 181 (1984)), claiming the trial court did not sufficiently inquire into his ineffective-assistance-of-counsel claim. The problem with this issue is the record does not reveal that defendant ever raised a challenge to trial counsel's conduct. The court could not have improperly disregarded a claim that defendant did not raise during the trial court proceedings.

¶ 14 As his eleventh claim, defendant argued his sentence violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because it was enhanced without presenting the issue to a jury. This court has previously addressed this issue and held that mandatory Class X sentencing does not violate *Apprendi*. See *People v. Givens*, 319 Ill. App. 3d 910, 914 (2001).

¶ 15 As his twelfth claim, defendant insisted he had raised the affirmative defense of insanity. He claimed the protection of his constitutional rights demanded that the subject be raised during *voir dire* in order to question whether any prospective juror held a preconceived idea regarding such a defense. He further contended that wide latitude should have been afforded counsel during cross-examination of the State's expert witness challenging defendant's insanity defense. Again, like the *Krankel* issue, the problem with defendant's argument is that such a defense was never raised, so the principles of law cited by defendant do not apply.

¶ 16 Our review of the record, in light of defendant's petition, indicates that no meritorious issues could be raised on appeal. We agree with OSAD's assessment, and therefore, grant it's motion to withdraw as counsel and otherwise affirm the trial court's judgment.

¶ 17 Affirmed.