2013 IL App (1st) 111912-U

FOURTH DIVISION
December 19, 2013

No. 1-11-1912

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 05 CR 14515
	)	
YAHFE SUTTON,	)	Honorable
	)	Kevin M. Sheehan,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices Fitzgerald Smith and Epstein concurred in the judgment.

O R D E R

¶ 1 *Held*: Summary dismissal of defendant's post-conviction petition reversed where defendant presented an arguable claim that he was denied effective assistance of counsel due to counsel's failure, during motion to suppress, to establish evidence sought to be suppressed; reversed and remanded.

¶ 2 Defendant Yahfe Sutton appeals from an order of the circuit court summarily dismissing his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010). He contends the circuit court erred in summarily dismissing his petition because

he presented an arguable claim that at a hearing on a motion to suppress evidence, his counsel was ineffective for failing to introduce testimony that evidence was in fact seized. We reverse and remand for further proceedings under the Act.

¶ 3 The record shows that in June 2005, defendant was charged with one count of possession of a controlled substance with intent to deliver. At trial, the State maintained that after midnight on May 27, 2005, following a conversation with victims of a shooting, police officers went to 5803 South Ada in Chicago. There, they observed defendant standing alone on a porch and then saw him run into the house. The officers chased defendant inside, where they observed him put a bag inside a vent. The bag was subsequently recovered and determined to contain cocaine and crack cocaine. The defense position was that defendant was inside the house during the entire incident. The house was owned by defendant's grandmother.

¶ 4 Through private counsel, defendant filed a motion to suppress evidence. At the hearing on the motion, Darius Moss, one of the victims of the shooting, testified that he knew defendant from the neighborhood. Just after midnight on May 27, Moss was in a car in front of his house at 5813 South Ada with two other people when a man approached and shot at them, hitting the car. Moss began driving away, but was pulled over by a police officer who had heard the shots fired. The officer detained Moss and the other passengers to ask them questions. Moss told the police the shooter was slim, black, was of average height, and had braids. Moss did not name defendant, who did not have braids, as the shooter and did not know who the shooter was. On cross-examination, Moss admitted that he had signed a criminal complaint that named defendant as the shooter, but stated that when he signed it, the complaint did not list any names.

¶ 5 Latashia Lloyd testified that defendant had been her boyfriend and on the night of the incident she and defendant went to bed around 11:30 p.m. She heard gunshots sometime after midnight and tried unsuccessfully to wake up defendant. Shortly afterwards, she heard a loud

boom. As she tried again to wake up defendant, police entered the bedroom with their guns drawn, told them to get dressed, and escorted them outside.

¶ 6 Tiffany Sutton, defendant's sister, testified that she was one of five people, including defendant, who stayed at 5803 South Ada on May 27. Sometime after midnight, Sutton heard gunshots, but did not panic because she "knew everyone was accounted for." A few minutes later, she heard someone beating at the door and people "[charged] upstairs," saying "police, police." The police brought out everyone, including defendant, from the various bedrooms and asked Sutton "something about guns," but she responded that she did not know what they were talking about. After Sutton was handcuffed and taken to a police vehicle outside, the police showed Sutton money and a bag containing a white substance she thought was cocaine. The police also presented Sutton with a consent to search form, which she initially did not want to sign because the police had already searched the home. However, when an officer told her she had to sign it or they would "put all this s*** on [her]," Sutton signed the form.

¶ 7 After defendant rested, the State moved for a directed finding, contending that defendant had not proven or shown what items he sought to suppress. The State also asserted that defendant had not shown that he had a reasonable expectation of privacy for the place searched and the items seized, which it assumed was the cocaine and money that was recovered. In response, defense counsel contended that the cocaine and money were obviously the items that defendant sought to suppress. Defense counsel added that defendant had an expectation of privacy because he was sleeping in the family residence.

¶ 8 The court granted the State's motion, noting that there was no evidence that defendant was charged with the cocaine in question or that the cocaine was taken from his person or presence. As such, there was no nexus between defendant and the evidence sought to be suppressed. Defense counsel asked for the court to take judicial notice of defendant's charge,

and said if allowed to reopen her case, she could call a police officer to testify he was charged with a crime. However, the court declined defense counsel's requests.

¶ 9 The matter proceeded to trial, where the State presented testimony explaining why the officers entered 5803 South Ada and what they found inside. Sergeant Carlos Ferrer testified that he was in the area after midnight on May 27 and heard several gunshots. He then curbed a car that was driving in the wrong direction on a one-way street. Sergeant Ferrer called for backup officers and spoke with the three people in the car, which included Darius Moss. Sergeant Ferrer also noticed that the car had two bullet holes. After their conversation, the officers went to 5803 South Ada to investigate a shooting.

¶ 10 Officer Gonzalez testified that he was part of the conversation with Moss and the other occupants. After he received a description and location, Officer Gonzalez drove to 5803 South Ada, where he observed defendant standing alone on the porch. As Officer Gonzalez began to get out of his car, defendant ran in the house. Officer Gonzalez pursued defendant by forcing open the door, and observed defendant running up the stairs while holding a bag in his arms. Chasing defendant into a bedroom, Officer Gonzalez saw him place the bag inside a vent on the floor. Officer Gonzalez then detained defendant and recovered the bag, which contained nine bags of powder cocaine and one bag of crack cocaine.

¶ 11 Officer Andres Ohlsen testified that he detained defendant along with Officer Gonzalez, and did so because he "had information that [defendant] was involved in the shooting of Darius Moss." In addition to the narcotics recovered by Officer Gonzalez, $2,107 was recovered from the bedroom dresser. On cross-examination, Officer Ohlsen admitted that none of the officers had a search warrant to enter the house.

¶ 12 Officer Meador was also a responding officer on May 27. After a two or three minute conversation with the occupants of the car that had been shot, Officer Meador went to 5803

South Ada, where he saw a "male [b]lack" standing on the porch, identified in court as defendant. Officer Meador explained that the officers wanted to search the house because they were investigating a shooting, were looking for a weapon, and believed "there was a gun in there."

¶ 13 For the defense, Moss's trial testimony was consistent with his testimony at the hearing on the motion to suppress. Additional testimony included that during Moss's conversation with the police, he said "they were shooting on 58th and Ada." The other defense witnesses' testimony was also consistent with their testimony at the hearing on defendant's motion to suppress.

¶ 14 Following closing arguments and deliberations, a jury found defendant guilty of possession of a controlled substance with intent to deliver. Defendant was sentenced to 25 years in prison.

¶ 15 On direct appeal, defendant argued the following issues: (1) he was denied a fair trial when Officer Ohlsen repeatedly referred to the fact that he allegedly fired a gun at Moss, despite a ruling on a motion *in limine* forbidding such references, and (2) he was denied a fair trial based on seven alleged instances of prosecutorial misconduct during opening and rebuttal closing argument. This court affirmed defendant's conviction and sentence on April 30, 2010 and issued a modified final ruling following a petition for rehearing on August 20, 2010. *People v. Sutton*, No. 1-08-2263 (2010) (unpublished order under Supreme Court Rule 23).

¶ 16 Through counsel, defendant filed the instant post-conviction petition on March 21, 2011, asserting that defense counsel's failure to establish a nexus between defendant and the narcotics constituted ineffective assistance of counsel. The petition stated that the court granted the State's motion for a directed finding because defense counsel failed to establish that defendant had any relationship to the narcotics. The petition further stated that at the hearing on defendant's motion

to suppress evidence, defense counsel did not call defendant or any police officers involved in the search of the house, the recovery of the narcotics, and the subsequent arrest of defendant for allegedly possessing the narcotics. The petition alleged that if defendant had been permitted to testify at the hearing, he would have established his relationship and standing to contest the police officers' warrantless entry into his grandmother's home. Additionally, a police officer's testimony about the facts surrounding defendant's arrest would have clearly established defendant's relationship to the narcotics in question and why he had been arrested for allegedly possessing them.

¶ 17 In support of his petition, defendant attached his own affidavit, in which he averred that prior to the hearing on the motion to suppress evidence, his trial counsel repeatedly told him that he had a perfect motion, that he would win the motion, and that "there was no way [defendant] was going to lose the case." Defendant also averred that prior to the hearing, he told his counsel he was willing to testify, but his counsel told him he should not testify because it was not necessary and because his criminal background would come up and be used against him at trial. Defendant alleged that he told counsel that the house at 5803 South Ada belonged to his grandmother, but he stayed there often and kept clothes there. Defendant averred that after the hearing, he asked counsel why she had not called a police officer to testify, and she responded that she did not need to do so.

¶ 18 On June 2, 2011, the circuit court summarily dismissed the petition as frivolous and patently without merit. In its written order, the court stated that defendant's claim of ineffective assistance of counsel was waived because it was premised on the trial record. The court also found that defendant had not attempted to show that his counsel's actions were unreasonable and that he was prejudiced by counsel's tactics or decisions. Even assuming that his counsel's

decision was unreasonable, the court found that defendant was not prejudiced because the police had probable cause to enter the residence.

¶ 19 In this court, defendant asserts that his petition made an arguable showing that his trial counsel was ineffective for failing to introduce evidence at the hearing on the motion to suppress evidence that the police seized cocaine from defendant. Defendant contends his counsel's performance was arguably unreasonable because it was inexcusable for an attorney to neglect to present testimony at a motion to suppress evidence that there was evidence to suppress and further, counsel could have easily called one of the arresting officers or defendant to testify about the seizure. Defendant asserts that his counsel's actions demonstrated a profound misunderstanding of fourth amendment principles. Additionally, defendant contends he was arguably prejudiced by his counsel's actions because if his counsel had presented testimony that the cocaine was seized, defendant would have prevailed at the hearing, as the police did not have a warrant and lacked probable cause and exigent circumstances to justify the search and seizure. Defendant asserts that as a result, there would have been no other evidence to support the charge.

¶ 20 The Act provides a three-step process for a defendant to challenge his conviction or sentence for violations of federal or state constitutional rights. 725 ILCS 5/122-1—122-7 (West 2010). Proceedings begin when a defendant files a petition in the court where the original conviction occurred. 725 ILCS 5/122-1(b) (West 2010). At this stage, the threshold for survival is low (*People v. Hodges*, 234 Ill. 2d 1, 9 (2009)) and a petition need only present the "gist" of a constitutional claim (*People v. Edwards*, 197 Ill. 2d 239, 244 (2001)). A petition may be dismissed only if the court determines it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2010). A petition is frivolous and patently without merit only if it has no arguable basis in law or fact, meaning that it is based on an indisputably meritless legal theory or a fanciful factual allegation. *Hodges*, 234 Ill. 2d at 16. An indisputably meritless legal theory is

one which is completely contradicted by the record and fanciful factual allegations include those which are fantastic or delusional. *Id.* at 16-17. The standard for first-stage dismissals is the same whether or not the defendant is represented by counsel. *People v. Tate*, 2012 IL 112214, ¶ 11-12. We review the summary dismissal of a defendant's petition *de novo*. *Edwards*, 197 Ill. 2d at 247.

¶ 21 As a threshold matter, the State contends that defendant forfeited his ineffective assistance of counsel claim because it could have been raised on direct appeal. We agree with defendant, however, that his claim is not forfeited because it is based on evidence not contained in the direct appeal record. As a general rule, because a post-conviction proceeding is a collateral attack on the trial court proceedings, issues that could have been raised on direct appeal but were not are forfeited. *People v. Petrenko*, 237 Ill. 2d 490, 499 (2010). However, this rule is relaxed where the facts relating to the claim do not appear on the face of the original appellate record. *People v. Williams*, 209 Ill. 2d 227, 233 (2004). Indeed, when an ineffective assistance of counsel claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim, and the record may not contain the evidence of alleged errors of omission or the reasons underlying them. *Massaro v. United States*, 538 U.S. 500, 504-05 (2003). Here, defendant's affidavit contains information about defendant's discussion with his trial counsel about the hearing on the motion to suppress. Allegations in the affidavit include that defendant told his counsel he was willing to testify, but his counsel told him not to do so because it was not necessary and because his criminal background would come up and be used against him at trial. Defendant also told his counsel that the house belonged to his grandmother, but he stayed there often and kept clothes there. This exchange provides insight into the reasons counsel acted as she did and the information counsel had at the time of the hearing, and is not contained

anywhere in the direct appeal record. As the claim's evidentiary basis is outside the record, it is not forfeited.

¶ 22 We now turn to the substance of defendant's claim. Claims of ineffective assistance of counsel are subject to a two-prong test in which a defendant must show that: (1) his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1985). In first-stage post-conviction proceedings, where a more lenient standard applies, a petition may not be summarily dismissed if: (1) it is arguable that counsel's performance fell below an objective standard of reasonableness, and (2) it is arguable that the defendant was prejudiced. *Hodges*, 234 Ill. 2d at 17.

¶ 23 As to performance, it is arguable that defendant's counsel's performance was deficient. Generally, a defendant must overcome a presumption that the challenged action might be considered sound trial strategy. *Strickland*, 466 U.S. at 689. Here, however, counsel's decision not to call a police officer or defendant to establish defendant's possession of the cocaine was unsound trial strategy. Fourth amendment protection against unreasonable government search and seizure extends only to people who have a reasonable expectation of privacy in the place searched or property seized. *People v. Johnson*, 114 Ill. 2d 170, 191 (1986). Defendant's counsel failed to establish defendant's relationship to the cocaine, which made it impossible for the motion to succeed. Further, her decision not to call defendant was unsound strategy because it was based on her mistaken belief that his testimony could be used against him at trial. In reality, when a defendant testifies at a hearing on a motion to suppress evidence on fourth amendment grounds, his testimony may not be admitted against him at trial on the issue of guilt, unless the defendant fails to object. *People v. Rosenberg*, 213 Ill. 2d 69, 79 (2004). While prior convictions may be used to attack the credibility of a witness (*People v. Montgomery*, 47 Ill. 2d

510, 516-19 (1971)), any criminal background would not come out at trial as long as defendant did not testify at trial. A mistake of law can be a basis for finding that an attorney was ineffective. *People v. Patterson*, 192 Ill. 2d 93, 121 (2000). As such, counsel's decision, based on a mistake of law, rendered her performance arguably unreasonable.

¶ 24 Turning to the prejudice prong, a defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. Whether defendant would have prevailed at the hearing and suppressed the cocaine depends on whether the officers could lawfully enter the house without a warrant. We note that in reviewing the denial of a motion to suppress, we may consider the evidence heard on the motion itself and the evidence adduced at trial. *People v. Breeding*, 219 Ill. App. 3d 590, 591 (1991). Generally, a warrantless search and nonconsensual entry into a suspect's home is prohibited by the fourth amendment, even with probable cause. *People v. Wear*, 229 Ill. 2d 545, 567 (2008) (citing *Payton v. New York*, 445 U.S. 573, 586-87 (1980)). To lawfully enter a private residence and effectuate an arrest, the police need a warrant, the resident's consent, or probable cause coupled with exigent circumstances. *People v. Williams*, 383 Ill. App. 3d 596, 625 (2008).

¶ 25 Here, it is arguable that the outcome of the proceeding would have been different if possession of the cocaine had been established, based on an insufficient showing of probable cause to enter the house without a warrant and arrest defendant. Probable cause exists for an arrest where the facts and circumstances known to the officers at the time of the arrest are sufficient to warrant a man of reasonable caution to believe that an offense has been committed and that the offense was committed by the person arrested. *People v. Shelby*, 221 Ill. App. 3d 1028, 1036 (1991). Here, the officers testified that based on a conversation with Moss and the other occupants of the car, they went to 5803 South Ada to investigate a shooting. The officers

saw defendant on the porch, and when he ran inside, they chased him. Moss testified that he did not tell the officers that defendant was the shooter and said the shooter was slim, black, of average height, and had braids, which defendant did not have. There was no other evidence presented at the hearing or at trial of what the officers were told about the shooter and what led them to believe defendant was the shooter. A general description does not in itself establish probable cause to arrest one fitting that description. *Id*. at 1043. See also *In re D.W.*, 341 Ill. App. 3d 517, 523-24 (2003) (no probable cause where informant described the suspect as a "black male with a large build named Darrian," but the officer did not describe the individual he believed to be the defendant and did not know defendant lived in the building that was entered until after his arrest). Additionally, while unprovoked flight in the face of a potential encounter with police may raise enough suspicion for an investigatory stop (*People v. Thomas*, 198 Ill. 2d 103, 113 (2001)), here the officers went beyond an investigatory stop and entered a home. Further, in a case relied upon by the State regarding flight, *Shelby*, 221 Ill. App. 3d at 1043-44, where the court stated that flight coupled with reasonable suspicion may gave rise to probable cause, the police were given more detailed information about the suspect from two people prior to the suspect's flight—he was a particular height and weight and went by a particular nickname. Here, the officers' testimony did not establish how they identified defendant as the shooter described by Moss. Whether defendant will ultimately be entitled to relief on his claim is not at issue at this first stage of proceedings. *People v. Seaberg*, 262 Ill. App. 3d 79, 84 (1994). Rather, we find that defendant's claim of ineffective assistance of counsel is not indisputably meritless because the officers' testimony was not sufficient to establish probable cause to enter the house.

¶ 26 Defendant next asserts that on remand, this cause should be assigned to a different trial judge because in the second stage of proceedings, defendant could amend his petition to include

a claim that the judge who dismissed the petition, who also presided over the hearing on the motion to suppress and the trial, acted arbitrarily when he refused to allow counsel to re-open the motion to suppress. We decline to remand this cause to a different judge. A defendant has no absolute right to a substitution of judge in a post-conviction proceeding, and in fact, the judge who presided over the criminal trial should hear the post-conviction petition unless it is shown that the judge is substantially prejudiced. *People v. Harvey*, 379 Ill. App. 3d 518, 522 (2008). Ordinarily, the fact that a judge has ruled adversely to a defendant in a prior case does not disqualify that judge from sitting in a subsequent case. *People v. Vance*, 76 Ill. 2d 171, 178 (1978). To obtain a remand to a new judge, a defendant must show something more than that the judge presided over the defendant's earlier trial, such as animosity, ill will, distrust, prejudice, predilections, or arbitrariness. *People v. Reyes*, 369 Ill. App. 3d 1, 25 (2006). Where we have found such prejudice to exist, there has been evidence that the trial court improperly prejudged the merits of an issue in the defendant's post-conviction petition. See *Id*. at 25-26. Here, defendant bases his request for a new judge solely on the fact that the judge did not allow defense counsel to re-open the motion to suppress. This is insufficient to support a request to remand this case to a different judge.

¶ 27 For the foregoing reasons, we reverse the judgment of the circuit court and remand for further proceedings.

¶ 28 Reversed and remanded.