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2013 IL App (3d) 110523-U

Order filed April 16, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 13th Judicial Circuit,
Plaintiff-Appellee,)	La Salle County, Illinois,
)	
v.)	Appeal No. 3-11-0523
)	Circuit No. 04-CF-412
JESSE PHILLIPS,)	
)	Honorable
Defendant-Appellant.)	Cynthia M. Raccuglia,
)	Judge, Presiding.

PRESIDING JUSTICE WRIGHT delivered the judgment of the court.
Justices Carter and Schmidt concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant's postconviction petition was properly dismissed. Defendant's allegation that his counsel provided ineffective assistance at resentencing for failing to argue that a reduction in sentence was necessary and for failing to remind the judge that she had previously considered improper factors in forming defendant's original 25-year sentence was barred by *res judicata*. This court previously determined on direct appeal from resentencing that the trial court did not consider any improper factors in resentencing defendant and that a remand for new sentencing was not a mandate for a lesser sentence.
- ¶ 2 Defendant, Jesse Phillips, was found guilty of unlawful delivery of a controlled substance

(cocaine) (720 ILCS 570/401(c)(2) (West 2004)). He was sentenced to 25 years of imprisonment. On direct appeal, this court remanded this cause for an inquiry into defendant's claims of ineffective assistance of counsel and to conduct a new sentencing hearing due to the possibility of improper factors being considered at sentencing. *People v. Phillips*, No. 3-05-0061 (2007) (unpublished order under Supreme Court Rule 23). On remand, defendant's ineffective assistance claims were denied, and he was again sentenced to 25 years of imprisonment. On appeal, this court affirmed defendant's conviction and sentence. *People v. Phillips*, No. 3-07-0808 (2009) (unpublished order under Supreme Court Rule 23).

¶ 3 Defendant filed a postconviction petition alleging that his counsel provided ineffective assistance during resentencing on remand. The State filed a motion to dismiss, which was granted. Defendant appeals. We affirm.

¶ 4 **FACTS**

¶ 5 During defendant's original sentencing hearing, defendant raised his hand during the State's argument regarding sentencing alternatives. Defendant again raised his hand during defense counsel's argument. The trial judge indicated that defendant was not making matters better for himself. Defendant was given the chance to make a statement, during which he professed his innocence. While the judge was noting defendant's lack of remorse and unfounded continued complaints of police corruption and police setup, defendant again raised his hand. The judge indicated that every time defendant raised his hand he was increasing the years of his sentence. She also indicated that her view of defendant would be different if he had indicated that he was guilty. She stated that if the evidence against defendant was not so overwhelming and was at least contradictory, she would not hold the fact that he went to trial against him. The

judge found no factors in mitigation and sentenced him to 25 years of imprisonment. Defendant appealed.

¶ 6 On direct appeal, defendant argued that the trial court abused its discretion in sentencing him. This court vacated defendant's sentence on the basis of the judge appearing to have possibly improperly punished defendant for not pleading guilty and for raising his hand during the hearing. This court remanded this case for a new sentencing hearing. *Phillips*, No. 3-05-0061.

¶ 7 At resentencing, the trial judge acknowledged this court's order and that this court "seemed to suggest" that she punished defendant for exercising his right to a trial and for raising his hand during sentencing. She clarified that she did not punish defendant for choosing to proceed to a jury trial. She imposed the same sentence of 25 years of imprisonment, noting defendant's lengthy criminal record, the need for deterrence of others, defendant's lack of remorse, and the overwhelming evidence of defendant's guilt.

¶ 8 Defendant filed a motion to reconsider his sentence, arguing that he continued to be penalized for improper factors. The judge stated:

"[A]t no time did I in any way penalize the defendant for going to trial and I agree with the appellate court. Some of the comments that were in the transcript may have suggested that but that was clearly not the case. Nor the intention of the Court.

The most aggravating factor in this case was the defendant's criminal history.

Among other things that I said. So I'm denying the Motion to Reconsider."

¶ 9 On direct appeal from resentencing, defendant argued that the trial court abused her discretion by imposing the same 25-year sentence on remand. This court indicated that defendant's sentence should be upheld regardless of it being the same as the original sentence.

¶ 10 Specifically, this court found that "the trial court took our directives seriously and did not ignore this court's mandate on remand." This court noted that pursuant to section 5-5-3(d) of the Unified Code of Corrections, the trial court may impose any sentence originally available to the court. 730 ILCS 5/5-5-3(d) (West 2008). This court further specified that where a sentencing order is vacated on appeal and the cause is remanded for new sentencing, such an action should not be construed as a mandate that a lesser sentence must be imposed, and the court was to consider the matter anew without the improper factors. *Phillips*, No. 3-07-0808, slip order at 11 (citing *People v. Colter*, 237 Ill. App. 3d 486 (1992)). This court found that the trial court "carefully and persuasively explained to defendant why its sentence following remand would be the same as the 25-year sentence originally imposed" and ruled that the trial court did not err in imposing the same sentence following remand as the original sentence. This court concluded, "Based on the record, we have determined that the court's sentence was well within the range of punishment, was not based on any improper considerations, and did not constitute an abuse of discretion." *Phillips*, No. 3-07-0808, slip order at 12.

¶ 11 Defendant filed a postconviction petition alleging that his counsel provided ineffective assistance during resentencing, which was dismissed. Defendant appeals.

¶ 12 ANALYSIS

¶ 13 On appeal, defendant argues that his postconviction petition was improperly dismissed. Specifically, defendant contends that his counsel at resentencing was ineffective for failing to argue for a lesser sentence than his original sentence and for failing to "remind" the judge that she previously improperly considered the factor of defendant raising his hand while the judge spoke. Defendant also argues that his appellate counsel was ineffective for failing to raise the

issue of his counsel's ineffectiveness during resentencing on appeal.

¶ 14 To show ineffective assistance of counsel, defendant must show that his counsel's performance fell below an objective standard of reasonableness and that he was prejudiced by his counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Albanese*, 104 Ill. 2d 504 (1984). To establish prejudice, defendant must prove that there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Simms*, 192 Ill. 2d 348 (2000).

¶ 15 Alleged ineffective assistance of appellate counsel is analyzed under the same standard. *Id.* It is not incompetence of appellate counsel to refrain from raising issues that are without merit. *Id.* In reviewing defendant's claim to determine whether defendant suffered any prejudice by his appellate counsel's alleged errors in failing to raise an issue on appeal, we must examine the merits of the underlying issue. *Id.*

¶ 16 In postconviction proceedings, issues that could have been presented on direct appeal but were not are deemed waived. *Id.* Additionally, prior determinations of the reviewing court on direct appeal are barred as *res judicata* as to issues actually decided. *Id.* The bar of *res judicata* cannot be avoided simply by rephrasing issues previously addressed on direct appeal. *Id.*

¶ 17 I. Ineffective Assistance of Counsel at Resentencing

¶ 18 During resentencing on remand, the trial judge acknowledged this court's order and carefully provided the factors that she considered in resentencing defendant. The trial judge specified that she was punishing defendant for his lengthy criminal record and lack of remorse, the overwhelming evidence against him, and for the purpose of deterring others. On appeal for the resentencing, this court specifically determined that the trial court's sentencing on remand

was conducted anew and was "not based on any improper considerations, and did not constitute an abuse of discretion." We found that the trial court "carefully and persuasively" explained why defendant was receiving the same 25-year sentence originally imposed and determined that the court's sentence was not based on any improper considerations.

¶ 19 In light of this court's previous decision that defendant was sentenced properly on remand, *res judicata* bars defendant from arguing that he was improperly sentenced. Therefore, the claims of error asserted in defendant's postconviction petition—essentially that the raising of his hand during the original sentencing hearing somehow improperly played a role during the resentencing hearing and that his sentence should have been less than his original sentence—were previously argued and decided by this court. Defendant fails to show that the result of the proceeding would have been different had his counsel requested a lesser sentence or reminded the judge that she may have improperly considered his hand-raising during the original sentencing hearing. Thus, defendant's claim of ineffective assistance of counsel fails.

¶ 20 II. Ineffective Assistance of Appellate Counsel

¶ 21 Consequently, it follows then that defendant's appellate counsel was not ineffective for failing to raise the issue of trial counsel's alleged incompetence because the issue was meritless.

¶ 22 CONCLUSION

¶ 23 The judgment of the circuit court of La Salle County is affirmed.

¶ 24 Affirmed.