

NOTICE
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2013 IL App (4th) 120122-U

NO. 4-12-0122

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
May 2, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Macon County
GENARO K. HENDRIX,)	No. 06CF448
Defendant-Appellant.)	
)	Honorable
)	Lisa Holder White,
)	Judge Presiding.

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

ORDER

¶ 1 *Held:* Because defendant failed to show "prejudice" within the meaning of section 122-1(f) of the Post-Conviction Hearing Act (725 ILCS 5/122-1(f) (West 2010)), the trial court was correct to deny him leave to file a successive petition for postconviction relief.

¶ 2 Defendant, Genaro K. Hendrix, appeals from an order in which the trial court denied him leave to file a successive petition for postconviction relief. See 725 ILCS 5/122-1(f) (West 2010). In our *de novo* review (*People v. Gray*, 2011 IL App (1st) 091689, ¶ 12), we affirm the trial court's judgment because defendant failed to show prejudice: he failed to show that the alleged error he did not raise in the initial postconviction proceeding so infected his trial as to deprive him of the due process of law. See 725 ILCS 5/122-1(f) (West 2010). Having found no showing of prejudice, we need not consider whether defendant showed the other element in section 122-1(f), that of cause. See *id.*

¶ 3

I. BACKGROUND

¶ 4

A. The Charges

¶ 5 Count I of the information charged defendant with violating section 401(a)(2)(D) of the Illinois Controlled Substances Act (Act) (720 ILCS 570/401(a)(2)(D) (West 2006)). That section provided it was a Class X felony, punishable by imprisonment for not less than 15 years and not more than 60 years, to possess, with the intent to deliver, "900 grams or more of any substance containing cocaine." *Id.*

¶ 6

Count II charged him with violating section 402(a)(2)(D) of the Act (720 ILCS 570/402(a)(2)(D) (West 2006)). That section provided it was a Class 1 felony, punishable by imprisonment for not less than 10 years and not more than 50 years, to knowingly possess "900 grams or more of any substance containing cocaine."

¶ 7

B. The Jury Trial (September 2006)

¶ 8

1. *Defense Counsel's Opening Statement*

¶ 9 In his opening statement to the jury, defense counsel said the defense would be that defendant did not possess, and knew nothing about, the cocaine at issue in the case.

¶ 10

2. *Evidence Adduced in the Trial*

¶ 11

1. David Dailey's Testimony

¶ 12

i. *The Search and the Handling of the Evidence*

¶ 13

The State called a detective of the Decatur police department, David Dailey, who testified in substance as follows. On March 21, 2006, he obtained a warrant to search the house at 353 North 18th Street in Decatur. He and other police officers executed the warrant the next day.

¶ 14

On a table in the kitchen, they found a black purse. Inside the purse were "15

individual plastic bags," each containing white powder, which Dailey suspected to be cocaine. Also, in a cabinet in the kitchen, police officers found a digital scale with a white substance on it. Dailey collected the white substance from the scale and put the substance in a bag. This was People's exhibit No. 6.

¶ 15 As for the 15 plastic bags from the purse, Dailey weighed each of them at the police station. Six of the bags weighed approximately 64 grams each, and 9 of the bags weighed approximately 63 grams each. After weighing each of the 15 bags, Dailey emptied their contents "into one large bag so all the cocaine was together." People's exhibit No. 2 was the commingled contents of the 15 bags.

¶ 16 *ii. The Interview of Defendant*

¶ 17 The police arrested defendant along with others who were at the house. Dailey interviewed defendant at the police station, and the interview was recorded on a digital video disc (DVD), People's exhibit No. 33.

¶ 18 At first, in the interview, defendant denied any knowledge of the cocaine the police had found in the house. Later in the interview, though, he admitted that a kilogram of cocaine had been in the house; that he had obtained the kilogram of cocaine three or four days before the search; and that he had divided the cocaine into "juice bags," each weighing 63 grams.

¶ 19 *b. The Stipulation*

¶ 20 The prosecutor told the trial court the parties had "a stipulation as to some chain of custody and chemistry." Defense counsel told the court he had discussed the stipulation with defendant and that defendant was "fine with it." Defendant was present for the stipulation and did not object to it.

¶ 21 The prosecutor read the stipulation to the jury. The parties stipulated, among other things, that a forensic scientist for the Illinois State Police, Michael Cravens, had "performed tests" on People's exhibit Nos. 2 and 6 and had determined, to a reasonable degree of scientific certainty, "that the chunky white powder contained in People's exhibit No. 2 was 926.0 grams of cocaine and that the chunky white material contained in People's exhibit No. 6 was less than 0.1 gram of cocaine."

¶ 22 *3. Defense Counsel's Closing Argument*

¶ 23 In his closing argument to the jury, defense counsel argued that the State had failed to prove, beyond a reasonable doubt, that defendant or anyone for whose conduct he was legally responsible had possessed the cocaine.

¶ 24 *4. The Jury's Verdict*

¶ 25 The jury found defendant guilty of unlawfully possessing, with the intent to deliver, 900 grams or more of a controlled substance.

¶ 26 *5. The Sentence*

¶ 27 In October 2006, the trial court sentenced defendant to imprisonment for 30 years.

¶ 28 *C. The Direct Appeal*

¶ 29 On direct appeal, defendant argued the trial court had erred by (1) admitting evidence of other crimes and (2) instructing the jury on accountability even though a theory of accountability had no support in the evidence. *People v. Hendrix*, No. 4-06-1043, slip order at 1 (Dec. 31, 2007) (unpublished order under Supreme Court Rule 23). We rejected both of those arguments and affirmed the trial court's judgment. *Id.* at 1-2.

¶ 30 *D. The Initial Postconviction Proceeding*

¶ 31 In August 2008, defendant filed a *pro se* petition for postconviction relief, in which he claimed his trial counsel had rendered ineffective assistance by entering into the stipulation. According to defendant, entering into the stipulation was unreasonable on defense counsel's part because the stipulation failed to disclose the analytical techniques and scientific instruments Cravens had used, whether the instruments had been tested for accuracy and were functioning properly, and how the results of the analysis were recorded.

¶ 32 In September 2008, the trial court summarily dismissed the postconviction petition as frivolous and patently without merit. We affirmed the summary dismissal, at the same time granting a motion by the office of the State Appellate Defender to withdraw from representing defendant in the appeal (see *Pennsylvania v. Finley*, 481 U.S. 551 (1987)). *People v. Hendrix*, No. 4-08-0748, slip order at 3 (May 21, 2010) (unpublished order under Supreme Court Rule 23).

¶ 33 We reasoned as follows:

"A claim of ineffective assistance of counsel has two elements: (1) substandard performance and (2) resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. 2d 674, 693, 104 S. Ct. 2052, 2064 (1984). By entering into the stipulation, defense counsel did nothing wrong. There was no substandard performance. '[T]o contest the results of chemical testing, without a basis for doing so, would have simply highlighted testimony regarding the nature of the drug and would have unduly magnified its importance, when defendant was better served by focusing the jury's attention on the critical issue of whether defendant knowingly possessed the

controlled substance.' *People v. Phillips*, 217 Ill. 2d 270, 285, 840 N.E.2d 1194, 1203 (2005).

Without any reason to believe that the equipment at the crime laboratory had malfunctioned or that Cravens had failed to follow the correct testing procedures, defense counsel could have deemed it unwise to insist on Cravens's live testimony, which would have had the deleterious effect of concentrating the jury's attention, for an hour or so, on 926 grams of cocaine. Defense counsel could have reasonably decided that the jury had better things to think about, such as whether defendant really resided in the house in which the police found the cocaine." *Id.* at 2-3.

¶ 34 E. Defendant's Motion To File a Successive Postconviction Petition

¶ 35 In November 2011, defendant filed a motion for leave to file a successive postconviction petition. In the proposed successive petition, he compared himself to the defendant in *People v. Jones*, 174 Ill. 2d 427 (1996). In that case, the police arrested Tony Jones for possessing five separate packets containing a white rocky substance that the police believed to be cocaine. *Id.* at 428. The State, however, tested only two of the five packets for the presence of cocaine. *Id.* Those two packets tested positively for cocaine (*id.*), but given the prevalence of look-alike substances on the illegal drug market, the supreme court held that the State had failed to prove, beyond a reasonable doubt, that the remaining three packets, the untested packets, likewise contained cocaine (*id.* at 430). Because the seriousness of the crime depended on the proven weight of the drugs (*id.* at 428-29), the supreme court affirmed the appellate court's judgment reducing Jones's

Class 1 felony to a Class 2 felony and reducing his sentence of imprisonment from six years to four years (*id.* at 430).

¶ 36 Similarly, defendant argued that, in his own case, the State would have been unable to prove, beyond a reasonable doubt, that all 15 bags contained cocaine, since Dailey had field-tested only 1 of the bags before dumping the contents of all 15 bags into an evidence bag and sending it to the crime laboratory. Even though, at the crime laboratory, the commingled contents of the 15 bags tested positively for the presence of cocaine, all that proved, beyond a reasonable doubt, was that 1 of the 15 bags had contained cocaine; it did not prove that all 15 of the bags had contained cocaine as opposed to a look-alike substance. Defendant faulted his trial counsel for rescuing the State from this problem of proof by stipulating, without any purity test, that "the chunky white powder contained in People's exhibit No. 6 was 926.0 grams of cocaine."

¶ 37 On January 7, 2010, the trial court denied leave to file the proposed successive postconviction petition, because defendant had not shown "cause" and "prejudice" within the meaning of section 122-1(f) (725 ILCS 5/122-1(f) (West 2010)).

¶ 38 This appeal followed.

¶ 39 II. ANALYSIS

¶ 40 To obtain permission to file a successive postconviction petition, defendant had to show prejudice. See 725 ILCS 5/122-1(f) (West 2010). "[A] prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violates due process." *Id.*

¶ 41 In describing violations of due process, courts often use the phrase "fundamentally unfair." See, e.g., *Doyle v. Ohio*, 426 U.S. 610, 618 (1976); *People v. Harris*, 206 Ill. 2d 1, 62

(2002); *Gredell v. Wyeth Laboratories, Inc.*, 346 Ill. App. 3d 51, 61 (2004); *Anderson v. McHenry Township*, 289 Ill. App. 3d 830, 832 (1997). Deficient performance by the appointed defense counsel can make a trial fundamentally unfair for the defendant. *People v. Evans*, 186 Ill. 2d 83, 93 (1999). Indeed, to prove a claim of ineffective assistance of counsel, the defendant must prove that "counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair." *Id.*

¶ 42 We do not see how entering into the stipulation could be characterized as "deficient performance" by defense counsel. As we explained when affirming the summary dismissal of defendant's initial postconviction petition, the stipulation could have had the effect of lessening the amount of time the jury focused on the drugs so as to allow defense counsel to direct the jury's attention to the issue of whether defendant had possessed the drugs. *Hendrix*, No. 4-08-0748, slip order at 2-3.

¶ 43 We understand defendant's argument that the stipulation rescued the State from a problem of proof, but actually, as far as we can see, there would have been no problem of proof, considering defendant's videotaped confession that "a kilogram of cocaine was inside the residence, that he had obtained a kilogram of cocaine three or four days before the search, and that he had divided the cocaine into 'juice bags,' each weighing 63 grams" (we quote from defendant's brief). It appears that defendant originally had possession of one substance, the kilogram, which he divided into 15 substances, which Dailey in turn recombined into 1 substance, which tested positively for the presence of cocaine. If the recombined substance contained cocaine, then, logically, the original kilogram, which defendant confessed to possessing, likewise had to contain cocaine. See 720 ILCS 570/401(a)(2)(D) (West 2006) ("900 grams or more of any substance containing cocaine").

¶ 44 This confession is one of the facts that makes defendant's case different from *People v. Coleman*, 2012 IL App (4th) 110463, to which defendant refers as a "companion case." At the time of the raid, Cassian T. Coleman was standing on the porch steps, and he had a key to the front door of the house. *Id.*, ¶ 4. On the kitchen table, beside Zundra Cotton's purse, were two empty, crumpled-up black plastic bags, inside each of which was a clear plastic wrapper: the kinds of materials commonly used to package kilograms of cocaine. *Id.*, ¶ 5. Coleman's fingerprints were on the two crumpled-up bags. *Id.*, ¶ 6. Cotton testified that Coleman was defendant's supplier and that, earlier in the day, before the raid, Coleman had brought over a package of cocaine and that she had helped him break it up into the 15 bags. *Id.*

¶ 45 Obviously, none of this evidence was good for Coleman, but at least he had an argument that it was not definitive proof he possessed the kilogram before it was broken up into the 15 bags. A jury could have been reluctant to believe Cotton. Granted, possession of the key suggested control of the house, which in turn suggested constructive possession of the drugs therein (see *People v. Nettles*, 23 Ill. 2d 306, 308-09 (1961)), but it was unknown when Coleman received the key—whether he received it before or after the kilogram was broken up—and he had an argument that, just because his fingerprints were on the empty bags, it did not necessarily follow that he handled the bags while either of them still contained a kilogram of cocaine.

¶ 46 We tried to scrupulously avoid any implication that these ultimately would be either winning arguments or losing arguments for Coleman. That was not the question in his case. *Id.*, ¶ 72. Instead, the only question was whether he had an arguable claim. *Id.*

¶ 47 That brings us to another important difference between Coleman's case and defendant's case. Because Coleman was appealing from the summary dismissal of his initial petition

for postconviction relief, all he had to do was convince us he had an *arguable* claim of ineffective assistance (*id.*, ¶ 49), *i.e.*, a claim that, even if it was unlikely, was not fantastic or delusional (*id.*, ¶ 50).

¶ 48 Defendant, by contrast, had a heavier pleading burden because he was seeking leave to file a successive postconviction petition. He had to do more than present an arguable claim. He had to show that the alleged error so infected his trial as to deprive him of due process. See 725 ILCS 5/122-1(f) (West 2010). In our *de novo* review (*Gray*, 2011 IL App (1st) 091689, ¶ 12), we conclude he failed to carry that pleading burden.

¶ 49 III. CONCLUSION

¶ 50 For the foregoing reasons, we affirm the trial court's judgment, and we assess \$50 in costs against defendant.

¶ 51 Affirmed.