

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).

2014 IL App (4th) 120597-U
NO. 4-12-0597

FILED
January 13, 2014
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Adams County
KEVIN L. SMITH,)	No. 08CF377
Defendant-Appellant.)	
)	Honorable
)	Scott J. Butler,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justice Steigmann concurred.
Presiding Justice Appleton dissented.

ORDER

¶ 1 *Held:* The appellate court affirmed the second-stage dismissal of a postconviction petition, finding (1) defendant did not show trial and appellate counsel were ineffective and (2) defendant's sentence is not void.

¶ 2 In December 2008, a jury found defendant, Kevin L. Smith, guilty of unlawful possession of a weapon by a felon. In March 2009, the trial court sentenced him to 12 years in prison. In October 2010, this court affirmed defendant's conviction and sentence. In December 2011, defendant's appointed counsel filed an amended petition for postconviction relief. In January 2012, the State filed a motion to dismiss. In June 2012, the trial court dismissed defendant's amended petition.

¶ 3 On appeal, defendant argues (1) the trial court erred in dismissing his postconviction petition and (2) his prison sentence is void. We affirm.

¶ 4

I. BACKGROUND

¶ 5 In October 2008, the State charged defendant by second amended information with one count of unlawful possession of firearm ammunition (720 ILCS 5/24-1.1(a) (West 2008)), alleging he, a person who had been convicted of a felony under the laws of Illinois, knowingly possessed a box of Winchester 26 auto 50-grain ammunition and he was on mandatory supervised release (MSR) at the time he possessed the ammunition. The State also charged him with one count of unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2008)), alleging he knowingly had in his possession less than 15 grams of a substance containing cocaine. Defendant pleaded not guilty.

¶ 6 In December 2008, defendant's jury trial commenced. Prior to trial, the prosecutor indicated he would try the cases separately and would proceed with the unlawful-possession-of-ammunition case.

¶ 7 Quincy police officer Nick Hiland testified he participated in the execution of a search warrant for weapons and ammunition on July 16, 2008, at an apartment at 1120 Lind Street. He did not find a handgun. A search of an entertainment center in the living room revealed a black book bag containing a black zippered bag, a digital scale, rubber gloves, and a box containing 36 rounds of .25-caliber ammunition. Defense counsel objected to a question on the significance of the scales, claiming the witness was not qualified as an expert. The trial court overruled the objection. Hiland stated the scales are known to weigh illegal drugs.

¶ 8 Officer Hiland identified exhibit No. 1 as a picture of the ammunition and the digital scale. Defense counsel objected to a question on the significance of the rubber gloves, which the trial court overruled. Hiland stated people who deal in narcotics often use rubber gloves to conceal their fingerprints. Hiland also testified there were two bedrooms in the apart-

ment. One bedroom had a child's bed and toys, and the other "appeared to be inhabited by adults." Hiland identified a picture of an earnings statement in defendant's name at 1120 Lind Street that was found in the bedroom.

¶ 9 Officer Hiland testified he noticed a white powdery residue on the weighing plate of the digital scale. In his experience, the residue was consistent with cocaine. Hiland conducted an interview with defendant, who acknowledged living at 1120 Lind Street but denied ownership of a handgun or ammunition.

¶ 10 Quincy police officer Bryan Martin testified he participated in the search of the residence and noted the ammunition and digital scale. Martin stated he had seen similar digital scales in drug investigations and noted the scales are used to weigh narcotics. Over defense counsel's relevancy objection, Martin testified the residue found on the scale was significant because cocaine, heroin, and methamphetamine have a white powdery residue.

¶ 11 The State moved to publish a certified copy of defendant's conviction for the felony offense of unlawful delivery of a controlled substance. Defense counsel offered a general objection, which the trial court overruled. The State then rested.

¶ 12 Nicole Smith, defendant's wife, testified she lived at 1120 Lind Street with her brother, his friend, and her son. Her brother and his friends would stay there "every other couple of days or so." She stated a bag shown in exhibit No. 1 belonged to a friend who never took it back. She told the police the items were not defendant's because she told him once he was released from prison that "it was either the drugs and selling" or her. Smith also told the police someone broke into the apartment a couple of days before the warrant was executed and that person could have planted the evidence. When she suspected someone was in the apartment, she woke defendant and told him to tell the person to leave.

¶ 13 During the jury-instruction conference, the trial court asked defense counsel whether he objected to the definitional and issues instructions for unlawful possession of a weapon by a felon, which included the nature of defendant's prior felony conviction—unlawful delivery of a controlled substance. Illinois Pattern Jury Instructions, Criminal, Nos. 18.07, 18.08 (4th ed. 2000) (hereinafter, IPI Criminal 4th). Defense counsel objected to including the specific nature of the prior felony on relevance grounds, claiming the nature of the prior conviction "tags" defendant as a drug dealer. The court overruled the objection, stating the committee notes direct the court to include the actual offense.

¶ 14 Following closing arguments, the jury found defendant guilty of unlawful possession of a weapon by a felon. In March 2009, the trial court sentenced him to 12 years in prison as a Class X offender. In April 2009, defendant filed motions for a new trial and to reconsider sentence. In July 2009, the court denied both motions.

¶ 15 On direct appeal, defendant argued he was denied the effective assistance of counsel where he was only on trial for unlawful possession of ammunition by a felon but counsel failed to object when the State elicited evidence suggesting he was involved in the sale of narcotics. This court disagreed, with one justice dissenting, finding defendant failed to show his counsel was ineffective under the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Smith*, No. 4-09-0514 (Oct. 4, 2010) (unpublished order under Supreme Court Rule 23). Under the performance prong of the *Strickland* standard, the majority stated as follows:

"Here, Officer Martin testified he participated in the execution of the search warrant that allowed for the search for and seizure of firearms and controlled substances. Officer Hiland testified a search of the entertainment center in the living room revealed a

black book bag, a digital scale, rubber gloves, and a box of ammunition. Given the close proximity of the seized items during the execution of the search warrant, the drug evidence was intertwined with the evidence of defendant's possession of the firearm ammunition. Thus, the evidence was relevant and admissible, and counsel's performance cannot be said to be deficient." *Smith*, No. 4-09-0514, at 7.

As to the prejudice prong of the *Strickland* standard, the majority stated as follows:

"Moreover, defendant cannot satisfy the prejudice prong of the *Strickland* test because no reasonable probability existed that the admission of the drug-related evidence altered the outcome of the case. The jury was fully aware of defendant's prior criminal history involving drugs, *i.e.*, through the certified copy of his conviction for unlawful delivery of a controlled substance. The ammunition was found in an apartment where defendant and Smith lived, thereby allowing the jury to infer he was in constructive possession of the items in the entertainment unit. The only evidence offered by the defense was highly suspect, given that Smith testified some unnamed person entered the apartment and planted the evidence. Defendant has failed to satisfy either prong of the *Strickland* standard, and thus his claim that he failed to receive the effective assistance of counsel fails." *Smith*, No. 4-09-0514, at 7-8.

¶ 16 In April 2011, defendant filed a *pro se* petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2010)). In July 2011, the trial court appointed counsel. In December 2011, defense counsel filed an amended petition for postconviction relief, alleging ineffective assistance of trial and appellate counsel. The amended petition, *inter alia*, alleged trial counsel was ineffective for failing to offer to stipulate to defendant's felon status as an element of the charged offense and for failing to include in his posttrial motion his objection to the jury instruction listing the name of defendant's prior conviction. The petition also alleged appellate counsel was ineffective for not raising this issue on direct appeal.

¶ 17 In January 2012, the State filed a motion to dismiss. The State argued any decision by trial counsel on whether to stipulate to defendant's felon status was a matter of trial strategy. As trial counsel was not ineffective, the State argued appellate counsel was also not ineffective on direct appeal.

¶ 18 In June 2012, the trial court issued its written order. The court stated it could not imagine what the trial strategy could have been in not stipulating to defendant's felon status. Thus, the court found trial counsel's performance fell below an objective standard of reasonableness. However, the court found that, based on the evidence presented, no reasonable probability existed that the jury would have returned a different verdict if defendant had offered to stipulate to his felon status. Since trial counsel was not ineffective, the court also found appellate counsel was not ineffective. Finding the amended petition did not demonstrate a substantial showing of a constitutional violation, the court dismissed the amended petition. This appeal followed.

¶ 19

II. ANALYSIS

¶ 20

A. Postconviction Petition

¶ 21 On appeal, defendant argues the trial court erred in dismissing his postconviction petition, claiming counsel was ineffective at defendant's jury trial for unlawful possession of ammunition by a felon by allowing the jury to hear defendant had a prior conviction for delivery of a controlled substance instead of stipulating to his status as a felon. Defendant also argues appellate counsel was ineffective for not raising the issue on direct appeal.

¶ 22 The Act "provides a mechanism for criminal defendants to challenge their convictions or sentences based on a substantial violation of their rights under the federal or state constitutions." *People v. Morris*, 236 Ill. 2d 345, 354, 925 N.E.2d 1069, 1075 (2010). A proceeding under the Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *People v. English*, 2013 IL 112890, ¶ 21, 987 N.E.2d 371. The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008).

¶ 23 The Act establishes a three-stage process for adjudicating a postconviction petition. *English*, 2013 IL 112890, ¶ 23, 987 N.E.2d 371. At the first stage, the trial court must review the postconviction petition and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010). If the petition is not dismissed at the first stage, it advances to the second stage. 725 ILCS 5/122-2.1(b) (West 2010).

¶ 24 At the second stage, the trial court may appoint counsel, who may amend the petition to ensure defendant's contentions are adequately presented. *People v. Pendleton*, 223 Ill. 2d 458, 472, 861 N.E.2d 999, 1007 (2006). Also at the second stage, the State may file an answer or move to dismiss the petition. 725 ILCS 5/122-5 (West 2010). A petition may be dismissed at the second stage "only when the allegations in the petition, liberally construed in

light of the trial record, fail to make a substantial showing of a constitutional violation." *People v. Hall*, 217 Ill. 2d 324, 334, 841 N.E.2d 913, 920 (2005). If a constitutional violation is established, "the petition proceeds to the third stage for an evidentiary hearing." *People v. Harris*, 224 Ill. 2d 115, 126, 862 N.E.2d 960, 967 (2007). In this case, the State filed a motion to dismiss, and we review the trial court's second-stage dismissal *de novo*. *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008.

¶ 25 Claims of ineffective assistance of counsel are evaluated under the two-pronged test set forth in *Strickland*. To establish ineffective assistance of counsel, a defendant must prove (1) his counsel's performance was deficient and (2) he was prejudiced by that deficiency. *Strickland*, 466 U.S. at 687. Our supreme court has stated "the defendant must demonstrate that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *People v. Colon*, 225 Ill. 2d 125, 135, 866 N.E.2d 207, 213 (2007) (quoting *Strickland*, 466 U.S. at 694).

¶ 26 Under the first prong, "a defendant must overcome a strong presumption that, under the circumstances, counsel's conduct might be considered sound trial strategy." *People v. Houston*, 226 Ill. 2d 135, 144, 874 N.E.2d 23, 29 (2007). Under the second prong, "a reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome." *Houston*, 226 Ill. 2d at 144, 874 N.E.2d at 30. A defendant must satisfy both prongs of the *Strickland* standard, and the failure to satisfy either prong precludes a finding of ineffective assistance of counsel. *Houston*, 226 Ill. 2d at 144-45, 874 N.E.2d at 30.

¶ 27 Claims of ineffective assistance of appellate counsel are also evaluated under the *Strickland* standard. *People v. Enis*, 194 Ill. 2d 361, 377, 743 N.E.2d 1, 11 (2000). "Appellate

counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence of counsel to refrain from raising issues that in his judgment are without merit." *People v. Mitchell*, 189 Ill. 2d 312, 332, 727 N.E.2d 254, 267 (2000). If the underlying issue is not meritorious, defendant has suffered no prejudice. *Enis*, 194 Ill. 2d at 377, 743 N.E.2d at 11.

¶ 28 Under the doctrine of *res judicata*, any issues the court considered on direct appeal are barred from being addressed in a postconviction proceeding. *People v. Ligon*, 239 Ill. 2d 94, 103, 940 N.E.2d 1067, 1073 (2010). With claims of ineffective assistance of counsel, our supreme court has applied *res judicata* when the issue of ineffectiveness of trial counsel has already been addressed on direct appeal and the postconviction petition added "somewhat different allegations of incompetence." *People v. Albanese*, 125 Ill. 2d 100, 105, 531 N.E.2d 17, 19 (1988). The supreme court has found three exceptions to the doctrines of *res judicata* and waiver, including " 'where fundamental fairness so requires; where the alleged waiver stems from the incompetence of appellate counsel; or where facts relating to the claim do not appear on the face of the original appellate record.' " *People v. Pitsonbarger*, 205 Ill. 2d 444, 458, 793 N.E.2d 609, 620 (2002) (quoting *People v. Mahaffey*, 194 Ill. 2d 154, 171, 742 N.E.2d 251, 261 (2000)).

¶ 29 In the case *sub judice*, defense counsel objected at the jury-instruction conference to the State's proposed instruction that specifically named defendant's previous conviction for unlawful delivery of a controlled substance. Counsel argued the conviction would tag him as a drug dealer in the eyes of the jury. The trial court overruled the objection, finding the committee notes to IPI Criminal 4th No. 18.07 direct the actual offense to be named.

¶ 30 Defendant now contends trial counsel was ineffective for not offering to stipulate to defendant's status as a felon. Defendant argues the trial court would have had to accept this

stipulation and the jury never would have heard he had previously been convicted of unlawful delivery of a controlled substance. See *People v. Walker*, 211 Ill. 2d 317, 341, 812 N.E.2d 339, 353 (2004) (holding "where the prosecution's sole purpose for introducing evidence of a defendant's prior felony conviction is to prove his status as a convicted felon and the defendant offers to stipulate to this element, the probative value of the name and nature of the prior conviction is outweighed by the risk of unfair prejudice and, thus, should be excluded"). Defendant also argues the jury instructions would have been altered to omit any mention of the name of his prior conviction. Defendant contends no reasonable strategy can account for counsel's decision, and he was prejudiced by counsel's failure to stipulate. Further, he argues appointed counsel was ineffective for not raising the issue on direct appeal.

¶ 31 In the direct appeal, a majority of this court found defendant failed to establish both prongs of the *Strickland* standard. As to the prejudice prong, the majority stated no reasonable probability existed that the admission of the drug-related evidence—the digital scale, rubber gloves, and residue—altered the outcome of the case. We then went on to note the jury was fully aware of defendant's prior criminal history involving drugs via the certified copy of his conviction for unlawful delivery of a controlled substance. Now, defendant argues the drug-related evidence prejudiced him by linking him to the crime through his prior conviction.

¶ 32 As before, we find defendant failed to satisfy the prejudice prong. The evidence indicated a black book bag was found in defendant's apartment. The bag contained the scale, the powdery residue, the gloves, and the ammunition. Defendant's wife testified she gave defendant an ultimatum when he got out of prison that "it was either the drugs and selling" or her. Further, her claim the evidence was planted by some unknown person was highly suspect. Given the totality of the evidence, we find the result of the proceeding would not have been different had

defendant's conviction for unlawful delivery of a controlled substance not specifically been told to the jury. Thus, as trial counsel was not ineffective, appellate counsel was also not ineffective for failing to raise this nonmeritorious claim of error on direct appeal.

¶ 33 B. Defendant's Status on MSR

¶ 34 Defendant argues his sentence is void as his status on MSR at the time the offense was committed—the fact necessary to make unlawful use of a weapon by a felon a Class 2 felony instead of a Class 3 felony—was never submitted to the jury or proved beyond a reasonable doubt. Defendant claims the lack of evidence of his MSR status and the resultant Class 2 felony sentence violates the ruling in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), which holds any factor that increases the sentencing range must be presented to the jury and proved beyond a reasonable doubt. In its brief, the State countered by stating defense counsel had agreed the jury should not be told of the MSR issue and thus defendant's argument on appeal is inappropriate under the doctrine of invited error. In his reply brief, defendant acknowledges the State's position and agrees the doctrine of invited error applies here. As defendant has now withdrawn this issue, we need not address it further.

¶ 35 C. Double Enhancement

¶ 36 Defendant argues his sentence is void due to a double enhancement since the same conviction that was used at trial to prove his status as a felon was also used to make him eligible to be sentenced as a Class X offender. We disagree.

¶ 37 "A double enhancement occurs when either (1) a single factor is used both as an element of an offense and as a basis for imposing a harsher sentence than might otherwise have been imposed, or (2) the same factor is used twice to elevate the severity of the offense itself." *People v. Guevara*, 216 Ill. 2d 533, 545, 837 N.E.2d 901, 908 (2005). A sentence that is not

permitted by statute is void and subject to attack at any time. *People v. Arna*, 168 Ill. 2d 107, 113, 658 N.E.2d 445, 448 (1995); see also *People v. Thompson*, 209 Ill. 2d 19, 25, 805 N.E.2d 1200, 1203 (2004) (stating a void order may be attacked at any time in any court, either directly or collaterally).

¶ 38 Section 5-5-3(c)(8) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-5-3(c)(8) (West 2008)) states, in part, as follows:

"When a defendant, over the age of 21 years, is convicted of a Class 1 or Class 2 felony, after having twice been convicted in any state or federal court of an offense that contains the same elements as an offense now classified in Illinois as a Class 2 or greater Class felony and such charges are separately brought and tried and arise out of different series of acts, such defendant shall be sentenced as a Class X offender."

This subsection does not apply unless the first felony was committed after February 1, 1978, the second felony was committed after conviction on the first, and the third felony was committed after conviction on the second. 730 ILCS 5/5-5-3(c)(8) (West 2008).

¶ 39 In this case, the State charged defendant in its second amended information with the offense of unlawful possession of firearm ammunition (720 ILCS 5/24-1.1(a) (West 2008)), alleging he, a person who has been convicted of a felony, knowingly possessed ammunition and he was on MSR at the time he possessed that ammunition. To prove his status as a felon, the State introduced a certified copy of defendant's conviction in case No. 04-CF-210, the judgment order of which indicates defendant was convicted of two Class 1 felonies of unlawful delivery of a controlled substance, with one offense committed in January 2004 and the other in February

2004. Defendant also has two Class 1 felony convictions from 1997, which he says he was convicted of on the same date. Here, the trial court's judgment indicates defendant's conviction for unlawful possession of firearm ammunition was a Class 2 felony, but the court sentenced defendant as a Class X offender under section 5-5-3(c)(8) of the Unified Code.

¶ 40 Defendant argues his sentence is void due to a double enhancement, claiming the only way in which he could have been sentenced as a Class X felon was to use his 2004 conviction a second time. Defendant relies on *People v. Griham*, 399 Ill. App. 3d 1169, 929 N.E.2d 1213 (2010), *People v. Chaney*, 379 Ill. App. 3d 524, 884 N.E.2d 783 (2008), and *People v. Owens*, 377 Ill. App. 3d 302, 878 N.E.2d 1189 (2007), which held the trial courts engaged in improper double enhancement by using the same prior conviction to upgrade the class of the defendants' charged offense and then also as a basis to sentence the defendants under the Class X sentencing scheme.

¶ 41 We find these cases distinguishable because they dealt with the elevation of the class of the charged offenses. Here, the State charged defendant with the offense of unlawful possession of firearm ammunition, alleging he was a felon and on MSR at the time of the offense. Generally, a person found to have committed this offense would be subject to sentencing as a Class 3 felon and be subject to a sentence between 2 and 10 years in prison. 720 ILCS 5/24-1.1(e) (West 2008). However, a person who commits the offense while on MSR is subject to sentencing as a Class 2 felon and a term of 3 to 14 years in prison. 720 ILCS 5/24-1.1(e) (West 2008). Thus, the elevation of the offense from a Class 3 felony to a Class 2 felony was not based on defendant's prior conviction but on his MSR status at the time the offense was committed.

¶ 42 In his reply brief, defendant claims the double enhancement was not based on the

elevation in the class of felony but on the use of a single conviction to prove his felon status and then to find him eligible for a Class X sentence. Without providing case law on point, defendant argues his Class X sentence is void because the State failed to specify which of the two 2004 convictions it was using at trial to prove his felon status. Here, however, only one conviction was specified in the charging instrument, and the trial court apprised the jury that defendant had previously been convicted of the felony of unlawful delivery of a controlled substance. Thus, only one 2004 conviction was used as an element of the offense, which, along with defendant's 1997 Class 1 felony conviction, left the other 2004 Class 2 conviction available to enhance defendant's sentence as a Class X offender. We find no error.

¶ 43

III. CONCLUSION

¶ 44 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we grant the State's request that defendant be assessed \$50 as costs for this appeal.

¶ 45 Affirmed.

¶ 46 JUSTICE APPLETON, dissenting.

¶ 47 I respectfully dissent. The admission of the scale as evidence, its purported use, and the untested "white powdery" substance bore absolutely no relationship to the charge upon which defendant was being tried. That defense counsel stood mute upon this evidence being adduced, I believe, is beyond deficient. That the jury was presented with evidence that a convicted felon had some bullets pales in substance to the prejudicial inference evoked by the State that defendant was an armed drug dealer. I would reverse and remand for a new trial.