

**NOTICE**

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2014 IL App (4th) 120621-U

NO. 4-12-0621

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

January 16, 2014

Carla Bender

4<sup>th</sup> District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

MARSHALL KING, JR.,

Defendant-Appellant.

) Appeal from

) Circuit Court of

) Livingston County

) No. 09CF207

)

) Honorable

) Jennifer H. Bauknecht,

) Judge Presiding.

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JUSTICE KNECHT delivered the judgment of the court.  
Justices Turner and Steigmann concurred in the judgment.

**ORDER**

¶ 1 *Held:* (1) We grant the office of the State Appellate Defender's motion to withdraw and affirm the trial court's first-stage summary dismissal of defendant's postconviction petition where defendant's petition fails to state the gist of a claim he was denied the effective assistance of appellate counsel.

(2) Where the trial court failed to strictly comply with this court's mandate on direct appeal, the cause is remanded so the trial court may comply.

¶ 2 This case comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as appellate counsel on the ground that no meritorious issues can be raised in this case. For the reasons that follow, we grant OSAD's motion to withdraw and affirm the trial court's judgment. Additionally, we remand the cause for issuance of an amended sentencing judgment in compliance with our mandate in *People v. King*, 2011 IL App (4th) 100558-U.

¶ 3 I. BACKGROUND

¶ 4 In August 2009, the State charged defendant, Marshall King, with armed habitual

criminal (720 ILCS 5/24-1.7 (West 2008)) (count I) and unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2008)) (count II). Following an April 2010 bench trial, the trial court found defendant guilty of counts I and II. In June 2010, the trial court sentenced defendant to a 22-year prison term on count I to be served concurrently with a 7-year term on count II.

¶ 5 The instant case originated out of a traffic stop involving defendant and his girlfriend, Tiona Manadier. Shortly after midnight on August 13, 2009, Manadier was driving a black sedan in the southbound lanes of Interstate 55. Defendant was a passenger in this car. As the sedan passed through the Pontiac, Illinois, area, two officers from the Livingston County Proactive Unit observed the sedan traveling at 55 miles per hour in the left passing lane. The two officers, Casey Kohlmeier of the Pontiac police department and Sam Fitzpatrick of the Fairbury police department, exited the turnaround lane in which they were parked and followed the sedan. Officer Kohlmeier checked the sedan's registration on his in-car computer and determined the sedan was registered to Charles Leach and the registration was expired. At this point, the officers initiated a traffic stop.

¶ 6 During this stop, Officer Kohlmeier approached the driver's side of the sedan. Officer Fitzpatrick approached the passenger's side of the sedan. Officer Kohlmeier spoke briefly with Manadier and obtained her and defendant's driver's licenses. Officer Kohlmeier returned to his police cruiser, while Officer Fitzpatrick remained outside the sedan. Officer Kohlmeier ran Manadier's and defendant's information "through the Liv Com dispatch center," which would indicate whether either of the two individuals had warrants for their arrest. The dispatch center indicated defendant had no outstanding warrants but Manadier had an outstanding arrest warrant out of Lake County, Indiana, for vehicle theft.

¶ 7 When Officer Fitzpatrick heard this information over his radio, he approached the driver's side of the sedan and asked Manadier to step out. As Officer Fitzpatrick was placing Manadier under arrest, Officer Kohlmeier approached the passenger's side of the sedan, where he spoke with defendant, apparently through the closed window. Defendant complied with Officer Kohlmeier's request he exit the sedan. During a search of defendant, a loaded Hi-Point Firearms model C-9 handgun was found in the waistband of his pants. Immediately following the discovery of the weapon, Officer Kohlmeier grabbed defendant's right hand and Officer Fitzpatrick grabbed defendant's left hand. Trooper Jeff Enderli of the Illinois State Police was also on the scene. He approached and placed handcuffs on defendant, then removed the weapon from defendant's waistband.

¶ 8 The same day, the State charged defendant as stated.

¶ 9 In October 2009, defendant filed a motion to suppress evidence, arguing the gun found on him was obtained as a result of an illegal search. At the November 2009 hearing on this motion, the following evidence was presented. Defendant was asked to describe the video recording of the stop as it was played for the court. Defendant testified after Manadier was removed from the sedan and arrested, he complied with the officer's request to exit the sedan. Immediately after he exited the sedan, Officer Kohlmeier attempted to search defendant.

Kohlmeier then asked defendant for consent to search his person. Defendant denied the request.

¶ 10 Officer Kohlmeier continued to question defendant. Kohlmeier asked defendant why he did not want to consent to a search and why he was "leaving Chicago coming down to the small southern towns from Chicago." Kohlmeier continued to ask defendant for his consent to search his person, and defendant repeatedly denied this request. Kohlmeier asked defendant whether he had anything illegal on his person or in his car. Defendant replied he did not.

Kohlmeier began searching defendant, even though he had not obtained defendant's consent. Kohlmeier went through each of defendant's pant pockets. When Kohlmeier moved to defendant's right-front pocket, he lifted defendant's shirt and saw the butt of a handgun protruding from defendant's waistband. Defendant maintained at no time did he give Kohlmeier, or any other officer present, consent to search his person.

¶ 11 On cross-examination, defendant testified he was aware of Manadier's outstanding warrant. Defendant knew the warrant had been out since May. Defendant did not discuss the ownership of the sedan with either officer. Instead, the officers spoke with Manadier regarding the subject. Defendant testified "[t]he vehicle was kept by my sister, but the vehicle was owned by one of her boyfriends." Defendant denied telling the officers the sedan belonged to his sister. Defendant does not know Charles Leach. Defendant maintained he never gave the police consent to search his person. Defendant was not nervous about a search, even though he had a gun on his person. Defendant did not consent because he was "familiar with the *Terry* stop rules; and that, basically, the officer didn't have any articulable suspicion to stop me."

¶ 12 Defendant then presented the testimony of Trooper Jeff Enderli of the Illinois State Police. Enderli testified he was working a joint criminal interdiction detail with the Livingston County Proactive Unit on the night in question. Enderli proceeded to the scene for officer safety reasons after "Liv Com gave [Kohlmeier and Fitzpatrick] a hit tone when they ran the female driver for being wanted out of Indiana for motor vehicle theft." Enderli arrived at the scene just after Sergeant J. Mitchell of the Livingston County sheriff's department. Defendant was already outside the sedan and was engaged with Officer Kohlmeier.

¶ 13 Trooper Enderli described his role in the apprehension of defendant. Enderli heard Officer Kohlmeier yell the word "gun," which caused him to rush up to the side of the sedan

where defendant was being held by Kohlmeier and Fitzpatrick. Kohlmeier and Fitzpatrick wanted Enderli to remove the weapon from defendant's waistband before he was placed in handcuffs. Enderli instead handcuffed defendant first, then removed the weapon and placed it on the hood of Kohlmeier's squad car. Enderli transported defendant to the Livingston County jail because Kohlmeier and Fitzpatrick were riding in a canine unit and Sergeant Mitchell was transporting Manadier.

¶ 14 The suppression hearing was continued to January 2010, where defendant presented the testimony of Officer Kohlmeier and Officer Fitzpatrick. Officer Kohlmeier testified on August 13, 2009, he was involved with the stop of a vehicle in which defendant was riding as a passenger. A video of the traffic stop was recorded from his squad car. Kohlmeier explained there was no audio recording of the incident because of a faulty connection between his wireless microphone and the video system. Apparently, the faulty connection was a recurring problem. Kohlmeier was shown the video recording of the stop and was asked to describe what occurred.

¶ 15 Officer Kohlmeier testified after Manadier was taken into custody, he spoke with defendant while defendant remained in the sedan. When asked why he was speaking with defendant, Kohlmeier replied, "Well, the driver had a warrant for vehicle theft. And we hadn't confirmed who actually owned the vehicle at that time. So I was speaking to the passenger about who owned the vehicle, which was his sister." Defendant was asked to exit the sedan so defendant would not have access to anything inside the vehicle. Kohlmeier requested defendant's consent to search his person because his intent was to place him in the backseat of a squad car while the sedan was searched. Defendant was not under arrest at this time and was free to leave.

¶ 16 Before performing the search, Officer Kohlmeier asked defendant whether

anything illegal was inside the sedan or on his person. Defendant replied no. Kohlmeier then asked defendant for his consent to search his person. Defendant wanted to know why. Kohlmeier explained to defendant he wanted his consent to search his person for security purposes, because the driver had a warrant for vehicle theft and Kohlmeier did not know what was inside the vehicle. Defendant then consented to a search of his person, even though he had a gun in his waistband.

¶ 17 Officer Kohlmeier was then questioned regarding his narrative report of this incident. Kohlmeier's report detailed the incident, describing his search of defendant and what he found as a result. Kohlmeier failed to include any mention of consent in this report. When confronted with this fact, Kohlmeier admitted he mistakenly omitted the fact defendant gave consent to search from the report. Kohlmeier did include the fact defendant consented to a search in the required "racial profiling sheet."

¶ 18 Officer Fitzpatrick testified he was riding along with Officer Kohlmeier on the night in question. Fitzpatrick arrested Manadier after the Liv Com dispatch center indicated she had a warrant for her arrest. Fitzpatrick handed Manadier off to Sergeant Mitchell, who secured Manadier in the backseat of his squad car. Fitzpatrick returned to the area where Kohlmeier was speaking with defendant. Fitzpatrick heard Kohlmeier explaining to defendant why Manadier was being arrested. Kohlmeier told defendant he wanted to search him. Kohlmeier was apparently explaining to defendant his reasons for wanting to search him, but Fitzpatrick could not remember the reasons given. Fitzpatrick heard Kohlmeier ask defendant for consent to search his person and heard defendant give his consent.

¶ 19 At the conclusion of the testimony, the State moved for a directed finding. The trial court, after hearing arguments from the State, defense counsel, and a *pro se* argument made by

defendant, granted the State's motion and denied defendant's motion to suppress. In so doing, the trial court found while the initial stop was a traffic stop, the nature of the stop changed immediately upon the officers' discovery Manadier was wanted in Indiana for vehicle theft. The initial stop changed into an investigation of vehicle theft. The trial court also found the ownership of the sedan was questionable due to the fact defendant told police the sedan belonged to his sister but it came back registered to Charles Leach. The questionable ownership of the sedan justified the officers in conducting an investigation to determine the ownership. The investigation would justifiably include a search of the vehicle. The fact Officer Kohlmeier wanted to search defendant "ma[de] sense." Further, the court found the officers' testimony to be credible and denied the motion to suppress for that reason. The trial court then stated "[i]rrespective of the consent of the defendant because of the nature of the investigation being conducted concerning the vehicle theft, the location, the officers have more than enough information to justify a pat-down of the defendant and his removal from the vehicle. So, either way, I believe that the motion was ill-founded, and it is denied."

¶ 20 Following the trial court's denial of the motion to suppress, defense counsel filed a motion to reconsider the court's ruling on the motion to suppress. Defendant sent a letter to the judge, which was treated as a *pro se* motion, asking the court to substitute his public defender. Accompanying this letter was a *pro se* motion to reconsider. Following a hearing, the court denied the motions. On March 8, 2010, the date set for defendant's jury trial, defendant waived his right to a jury. Defendant also filed a motion *in limine* seeking to bar any reference to the search of defendant and any item obtained as a result of the search. The trial court denied the motion. On April 13, 2010, the date set for defendant's bench trial, defendant requested to proceed *pro se*. The trial court denied defendant's request. Following the bench trial, the court

convicted defendant as stated. In June 2010, the trial court sentenced defendant as stated.

¶ 21 On direct appeal, defendant challenged his conviction under the one-act, one-crime rule. Defendant also contended that he was entitled to *per diem* credit against his \$20 Violent Crime Victims Assistance Act (VCVAA) fine. This court vacated defendant's conviction on count II, finding the conviction on count II was based on the same physical act, possessing the weapon, as count I and could not stand under the one-act, one-crime rule. *People v. King*, 2011 IL App (4th) 100588-U, ¶ 12. This court affirmed his \$20 VCVAA fine, finding defendant was not entitled to *per diem* credit against this fine. *Id.* ¶ 15. This court remanded the cause with directions to issue an amended sentencing judgment reflecting a conviction and sentence on count I only. *Id.* ¶ 17.

¶ 22 In April 2012, defendant initiated proceedings under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2012)). In May 2012, defendant filed an amended *pro se* petition for postconviction relief, on which defendant was allowed to proceed. Defendant's amended *pro se* petition for postconviction relief alleged defendant was denied the effective assistance of appellate counsel because his appellate counsel did not raise the denial of defendant's motion to suppress on direct appeal. Defendant alleged he was prejudiced by appellate counsel's performance because if counsel would have raised the denial of his motion to suppress, his conviction and sentence would have, conceivably, been reversed on appeal. In June 2012, the trial court dismissed defendant's amended *pro se* postconviction petition as frivolous and patently without merit.

¶ 23 This appeal followed. The trial court appointed OSAD to represent defendant on appeal. In August 2013, OSAD filed a motion to withdraw as appellate counsel, including in its motion a brief in conformity with the requirements of *Pennsylvania v. Finley*, 481 U.S. 551

(1987). The record shows service on defendant. On its own motion, this court granted defendant leave to file additional points and authorities, which he did on September 10, 2013. The State has responded. Defendant has filed a reply brief opposing OSAD's motion.

¶ 24

## II. ANALYSIS

¶ 25 A. Defendant's Claim of Ineffective Assistance of Appellate Counsel

¶ 26 OSAD contends no colorable argument can be made the trial court erred in dismissing defendant's postconviction petition at the first stage of proceedings under the Act. In his amended *pro se* postconviction petition, defendant alleged his appellate counsel was ineffective for failing to claim the trial court's denial of his motion to suppress was error. The court summarily dismissed defendant's petition as frivolous and patently without merit.

¶ 27 The Act provides a three-stage process by which a defendant may obtain a remedy for the substantial denial of his constitutional rights at trial. *People v. Edwards*, 197 Ill. 2d 239, 243-44, 757 N.E.2d 442, 445 (2001). "At the first stage, the trial court, without input from the State, examines the petition *only* to determine if [it alleges] a constitutional deprivation unrebutted by the record, rendering the petition neither frivolous nor patently without merit." (Emphasis and alteration in original; internal quotation marks omitted.) *People v. Bowens*, 2013 IL App (4th) 120860, ¶ 11. A postconviction petition is frivolous or patently without merit only where "the allegations \*\*\*, taken as true and liberally construed, fail to present the 'gist of a constitutional claim.'" *Edwards*, 197 Ill. 2d at 244, 757 N.E.2d at 445 (citing *People v. Gaultney*, 174 Ill. 2d 410, 418, 675 N.E.2d 102, 106 (1996)). In other words, the petition must have an arguable basis either in law or in fact. *People v. Petrenko*, 237 Ill. 2d 490, 496, 931 N.E.2d 1198, 1202 (2010). To have an arguable basis in law, the petition must not be premised on an "indisputably meritless legal theory, such as one that is completely contradicted by the record." *Id.* To have an arguable

basis in fact, the petition may not be based "upon a fanciful factual allegation, such as one that is clearly baseless, fantastic[,] or delusional." *Id.* Our review in this case is *de novo*, because a trial court's decision to dismiss a postconviction petition at the first stage as frivolous and patently without merit is a question of law. *Edwards*, 197 Ill. 2d at 247, 757 N.E.2d at 447.

¶ 28 To succeed on a claim of ineffective assistance of appellate counsel, a defendant must show (1) his counsel's performance was deficient as judged by an objective standard of reasonableness, and (2) "but for counsel's errors, there is a reasonable probability that the appeal would have been successful." *Petrenko*, 237 Ill. 2d at 497, 931 N.E.2d at 1203. Therefore, to state the gist of a claim defendant received ineffective assistance of appellate counsel and to survive first-stage summary dismissal, it must be *arguable* (1) appellate counsel's performance was deficient, and (2) defendant's appeal would have been successful had appellate counsel's performance been adequate.

¶ 29 In this case, it is not arguable defendant's direct appeal would have been successful. Had defendant's appellate counsel raised the trial court's denial of his motion to suppress on direct appeal, the trial court's decision to deny his motion would not have been reversed unless this court found the decision to be against the manifest weight of the evidence. See *People v. Slater*, 228 Ill. 2d 137, 149, 886 N.E.2d 986, 994 (2008) (In determining whether the trial court properly denied a motion to suppress, the court's factual findings are given great weight and will be disturbed only upon a finding they were against the manifest weight of the evidence, while the ultimate decision on whether to suppress is reviewed *de novo*). When the trial court found the police officers' testimony credible, it accepted their version of the events and implicitly found defendant consented to the search. This credibility determination made by the court would not have been disturbed on appeal as the record shows no indication this finding was against the manifest weight

of the evidence.

¶ 30 Defendant argues the consent implicitly found by the trial court was "tainted by the unlawful detention," and therefore, appellate counsel was ineffective for failing to raise the issue. Essentially, defendant contends although the initial stop of the vehicle was valid, the officers unreasonably prolonged the traffic stop after its purpose—to arrest the driver on her warrant—was completed, and as a result, the consent obtained by police to search his person was invalid. In support of this contention, defendant relies on a fact not established in the record—the "negative computer check" in which the sedan came back as "not stolen." Defendant asserts the "negative computer check objectively dispelled any 'reasonable' suspicion of vehicle theft," and to continue defendant's detention, the police needed additional facts supporting a reasonable, articulable suspicion a crime had been committed.

¶ 31 During the hearing on the motion to suppress, no testimony was elicited stating the computer check was negative. In fact, Officer Kohlmeier testified the computer check showed the registration was "just expired." No testimony was elicited stating the computer check showed the sedan was "not stolen." Further, the purpose of the stop was not to arrest the driver on her warrant. Instead, the initial purpose of the stop, which was to investigate the expired registration, was immediately transformed into an investigation of vehicle theft once the officers learned the driver had a warrant in Indiana for vehicle theft. As defendant's petition relied on facts not established in the record, defendant's claim of ineffective assistance of appellate counsel does not have an arguable basis in law or in fact. See *Petrenko*, 237 Ill. 2d at 496, 931 N.E.2d at 1202. Accordingly, no colorable argument can be made the trial court erred in dismissing defendant's amended *pro se* postconviction petition.

¶ 32 B. Trial Court's Failure To Comply With

### This Court's Mandate on Direct Appeal

¶ 33 The State pointed out the trial court, on remand, failed to issue an amended sentencing order reflecting a vacation of defendant's conviction on count II. The State argues, therefore, the cause must be remanded for strict compliance with this court's mandate on direct appeal. We agree.

¶ 34 "A trial court must obey the clear and unambiguous directions in a mandate issued by a reviewing court." *People v. Oaks*, 2012 IL App (3d) 110381, ¶ 29, 978 N.E.2d 1151 (citing *People ex rel. Daley v. Schreier*, 92 Ill. 2d 271, 276, 442 N.E.2d 185, 188 (1982)). As a rule, where a reviewing court gives specific directions on remand, the court to which the cause is remanded is charged with the positive duty to enter an order or decree in accordance with the directions contained in the mandate. *Schreier*, 92 Ill. 2d at 276, 442 N.E.2d at 188. "[W]hen a reviewing court issues a mandate, it vests the trial court with jurisdiction to take only such action as conforms to that mandate." *Id.* The failure of a trial court to comply with a court of review's mandate requires the cause to be remanded so the trial court can comply with the mandate. See *Mancuso v. Beach*, 187 Ill. App. 3d 388, 392, 543 N.E.2d 256, 259 (1989) (Where trial court failed to conduct further proceedings consistent with the appellate court's mandate, the order subsequently entered by the trial court was reversed and the cause remanded so the trial court could comply with the original mandate).

¶ 35 On defendant's direct appeal, we directed the trial court, on remand, to issue "an amended sentencing judgment reflecting a conviction and sentence on count I only." *King* ¶ 17. On December 23, 2011, the trial court issued an amended sentencing order. The amended order, however, failed to comply with our mandate—the amended order still indicates defendant was convicted on count II. The court also made minor changes (*i.e.*, checking boxes on the form not

previously checked) to the sentencing order, which exceeded the scope of our mandate. As the directions we gave the trial court on remand were specific and unambiguous, remand is warranted so the trial court may strictly comply with our mandate.

¶ 36

### III. CONCLUSION

¶ 37 For the reasons stated, we grant OSAD's motion to withdraw as counsel on appeal and affirm the trial court's order dismissing defendant's postconviction petition as modified. We remand for issuance of an amended sentencing judgment reflecting a conviction on count I only. As part of our judgment, we award the State its \$50 statutory assessment as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2012).

¶ 38

Affirmed as modified and cause remanded with directions.