2015 IL App (1st) 130857-U

FIRST DIVISION
March 23, 2015

No. 1-13-0857

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. 09 CR 2279
	)	
LEONARD HUFF,	)	Honorable
	)	Arthur F. Hill, Jr.,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

O R D E R

¶ 1 *Held*: Postconviction petition failed to set forth a gist of a claim for ineffective assistance of counsel where defendant did not adequately allege that he was arguably prejudiced by trial counsel's failure to attack a search warrant.

¶ 2 Following a bench trial, defendant Leonard Huff was found guilty of possession of a controlled substance with intent to deliver and sentenced to 12 years' incarceration. He filed a *pro* se petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West

2012)). The circuit court summarily dismissed his petition. On appeal, defendant contends that his petition set forth the gist of a constitutional claim that his trial counsel was ineffective where counsel failed to challenge the search warrant based upon inaccuracies in the warrant complaint. He also contends that the trial court failed to examine his petition within 90 days, where it filed a written order within the required time, but misconstrued one of the petition's complaints.

¶ 3 On December 4, 2008, Chicago police officer Francisco Gomez and "John Doe," a confidential informant, appeared before a judge and swore out a search warrant complaint for defendant and a second floor apartment at 2840 W. 66th Avenue in Chicago. In the complaint, Doe related that he had routinely purchased crack cocaine from defendant once or twice a week for the "past five to six months," and that defendant always had a supply of cocaine at the apartment. Doe had gone to the apartment on the previous day and seen "a large amount of suspect Crack Cocaine in a clear plastic bag." Gomez averred that he had attempted to corroborate the information by showing Doe defendant's picture, which Doe identified as the man who sold him drugs. Gomez drove with Doe to the given address, where Doe pointed out the building. Gomez noted that the mailbox for the indicated apartment was labeled "HUFF." The judge issued a search warrant.

¶ 4 At trial, Chicago police officers Francisco Gomez and Saud Haidari testified that they went to a second-floor apartment at 2840 W. 66th Avenue on December 6, 2008. A woman let the officers into the apartment and they searched the residence. The officers recovered a large quantity of money and a digital scale. They also found a clear bag containing white powder hidden in a chair cushion. Eleven days later, the officers returned to the apartment and arrested defendant.

¶ 5 Forensic chemist Maureen Bommarito testified that she tested a sample of the substance recovered from the apartment. The parties stipulated that the substance she tested was 17.988 grams of cocaine.

¶ 6 Blanca Gonzales, the owner of apartment building at 2840 W. 66th Avenue, testified for defendant. She testified that the second floor, right-hand apartment was leased to Yolanda Diggs and Joann Huff. The lease only permitted two occupants to live in the apartment. However, Gonzales admitted she did not check who was living in the apartment.

¶ 7 The trial court found defendant guilty of possession of a controlled substance with intent to deliver and sentenced him to 12 years' incarceration.

¶ 8 Defendant appealed his conviction to this court, arguing that the State failed to prove him guilty beyond a reasonable doubt and that the trial court erroneously admitted hearsay statements to establish his residency in the apartment. This court affirmed defendant's conviction, holding that the State had proven beyond a reasonable doubt that defendant had constructive possession of the drugs recovered and that the statements in question were not hearsay. *People v. Huff*, 2012 IL App (1st) 101231-U, ¶¶ 16, 23.

¶ 9 On October 3, 2012, defendant filed a document entitled "*Pro Se* Petition for Post-Conviction Relief". He argued that the trial court violated his right to due process when it failed to admonish him that he would serve a three-year term of mandatory supervised release. Subsequently, he filed another *pro se* document entitled "Petition for Post-Conviction Relief". In this petition, defendant argued, *inter alia*, that his trial counsel's representation was constitutionally deficient where counsel failed to "investigate the confidential informant information reported to Officer Gomez" and failed to challenge the search warrant despite the fact that the warrant "lacked probable cause, [because] the details provided by the confidential

informant were inherently unreliable." The petition alleged that defendant had been in the custody of the Cook County Sheriff during a portion of the period when Doe claimed he had routinely bought drugs from defendant. Defendant attached a letter from the deputy director of the Cook County "boot camp" which indicated that defendant had been in custody from April 10, 2008, until August 7, 2008.

¶ 10 On November 16, 2012, the trial court received a letter from defendant. The letter indicated defendant wished to withdraw his first petition and requested leave to file the second petition. The trial court granted defendant's requests on January 2, 2013. On the same day, the court dismissed defendant's petition in a written order. In relation to defendant's argument that his counsel had failed to investigate the informant, the court explained that defendant had asserted no facts or arguments which supported an argument that trial counsel should have "sought the identity of the John Doe informant." Defendant appeals.

¶ 11 On appeal, defendant first contends that his petition presented the gist of a claim that his trial counsel was constitutionally ineffective for failing to challenge the search warrant despite the fact that it lacked probable cause. He notes that Doe asserted that he had been buying drugs from defendant for "five or sixth months" prior to swearing out the warrant, and thus, Doe would have begun buying the drugs from defendant in June or July of that year. However, defendant was in custody in a Cook County Sheriff's boot camp from April until August 7, 2008. He also asserts that Doe's allegations lacked necessary corroboration.

¶ 12 The State responds that defendant has forfeited this issue, as he could have raised the issue on a previous appeal. Alternatively, the State argues that defendant's claim of ineffective assistance of counsel is meritless because trial counsel did not have a good faith basis to challenge the warrant where the police officer's conduct was reasonable; the warrant did not have

to establish Doe's reliability; and even if the warrant was invalid, the good faith exception to the exclusionary rule applied.

¶ 13 Before reaching the merits of defendant's claim, we must determine whether he has forfeited the claim. A postconviction proceeding is a collateral attack on the trial court proceedings, not an appeal from the judgment of conviction. *People v. Johnson*, 191 Ill. 2d 257, 268 (2000). Issues that could have been raised on direct appeal but were not are forfeited. *People v. Enis*, 194 Ill. 2d 361, 375 (2000). Therefore, when a claim is based entirely on facts contained in the trial court record, it is forfeited. *People v. Petrenko*, 237 Ill. 2d 490, 499 (2010). Defendant's present claim is based upon the search warrant, the warrant's complaint, and the letter from the boot camp official. None of these documents were included in the trial record. Thus, the issue could not have been raised on appeal and is not forfeited. See *id.*

¶ 14 We now turn to the merits of defendant's claim. The Act allows defendants to challenge their convictions based on a substantial violation of their rights under the federal or state constitution. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008); 725 ILCS 5/122-1 *et seq.* (West 2012). A postconviction proceeding consists of three stages. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). At the first stage of proceedings, as in this case, a postconviction petition may be summarily dismissed if it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2012). A post-conviction petition is frivolous or patently without merit only if the allegations in the petition, liberally construed in favor of the petitioner, do not form the gist of a constitutional claim. *Edwards*, 197 Ill. 2d at 244. We review the first stage dismissal of a postconviction petition *de novo*. *People v. Collins*, 202 Ill. 2d 59, 66 (2002).

¶ 15 Defendant asserts that his trial counsel was constitutionally deficient. To prevail on a claim of ineffective assistance of counsel a defendant must show 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. Domagala*, 2013 IL 113688, ¶ 36, quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984). In a first stage postconviction petition proceeding, a petition alleging ineffective assistance of counsel must show "(1) counsel's performance arguably fell below an objective standard of reasonableness; and (2) the petitioner was arguably prejudiced as a result." *People v. Brown*, 236 Ill. 2d 175, 185 (2010).

¶ 16 Defendant argues that trial counsel should have filed a motion for a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). He asserts that a *Franks* hearing would have resulted in Doe's false statement being stricken from the warrant complaint. Without that statement, the rest of the complaint lacked sufficient indications of reliability to sufficiently support a finding of probable cause. The State responds that because Doe was present before the judge, a showing of his reliability was not required.

¶ 17 *Franks* recognized a defendant's limited right to attack the veracity of a warrant affidavit. *Id.* at 155-56; see also *People v. Lucente*, 116 Ill. 2d 133, 146 (1987). An affidavit supporting a warrant is presumed valid, unless the defendant substantially shows "that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit" and that "the allegedly false statement is necessary to the finding of probable cause." *Franks*, 438 U.S. at 155-56. Even if a statement in the affidavit is shown to be false, the warrant will not be quashed where probable cause is shown through the remaining statements. See *People v. Edwards*, 144 Ill. 2d 108, 132 (1991).

¶ 18 Even assuming, *arguendo*, that defendant has arguably shown that Doe's statement regarding the five to six month time frame was intentionally or recklessly false, his claim fails

because the statement was not necessary to the judge's finding of probable cause. In reviewing the basis for a search warrant, we must determine whether the issuing judge had a substantial basis for finding that probable cause for the search existed. *People v. McCarty*, 223 Ill. 2d 109, 153 (2006). Probable cause exists when, based on all of the facts and circumstances indicated in the complaint, there is a fair probability that the specified evidence will be found at the named location. *People v. Sutherland*, 223 Ill. 2d 187, 219 (2006). In analyzing the totality of the circumstances, a reviewing court must also weigh the reliability of an affiant to the warrant. See *People v. Smith*, 372 Ill. App. 3d 179, 184 (2007). Typically, when the affiant appears before the judge, a showing of reliability is not required. *People v. Kornegay*, 2014 IL App (1st) 122573, ¶ 26. However, where the warrant does not indicate that the judge actually questioned the affiant, the affiant's presence, while an indication of reliability, is not dispositive. *Smith*, 372 Ill. App. 3d at 184. Other factors to be considered include whether the affiant described the basis of his personal observations, the details of his statements, police corroboration, and whether the statements are against the affiant's interest. See *Id.*

¶ 19 While Doe's appearance before the judge is not dispositive, it does weigh in favor of his reliability. Doe's statement was based on his personal observations while purchasing cocaine from defendant. His description was detailed, noting the packaging of the alleged drugs and their location within the bedroom of the identified apartment. He was able to identify defendant's picture and the apartment building. Furthermore, Doe's admission in the complaint that he bought and used controlled substances was against his penal interest, further bolstering his credibility. When viewed in the entirety, the facts and circumstances of the warrant support the judge's implicit determination that Doe's statements were reliable. As such, Doe's assertion that he had bought cocaine from defendant in his apartment on the previous day and that he had

observed additional drugs present did indicate a fair probability that contraband could be found at the apartment.

¶ 20 Defendant analogizes his case to *People v. Damian*, 299 Ill. App. 3d 489, 493 (1998). In *Damian*, a police officer conducted a single controlled-buy of narcotics with an informant six weeks prior to filing a complaint for a search warrant. *Id.* at 492. In the complaint, the informant vaguely stated that the defendant had drugs without describing their location. *Id.* The informant did not speak with the police officer during those six weeks, missed a scheduled meeting with the officer, and never appeared before the judge. *Id.* at 493. The trial court, and this court on appeal, held that the warrant lacked probable cause, focusing on the unexplained six week gap and the informant's vague allegations. *Id.* at 492. We find *Damian* inapposite to the current facts. *Damian* focused on the staleness and vagueness of the warrant. Moreover, the *Damian* informant never appeared before the judge, made only a vague assertion of drugs, and acted unreliably by failing to keep in contact with the police officers. *Id.* at 493. In the present case, Doe's statements contained sufficient indicators of reliability to support a finding of probable cause.

¶ 21 Even if we accept defendant's allegation that Doe's statement was not merely mistaken but was intentionally or recklessly false, defendant has not presented an arguable claim that he was prejudiced. Because the other allegations in the search warrant complaint were sufficient to support the judge's finding of probable cause, the challenged statement was not necessary to the judge's finding of probable cause. See *Edwards*, 144 Ill. 2d at 132. Consequently, a motion for a *Franks* hearing would have been denied, and defendant has failed to show that he was arguably prejudiced by trial counsel's alleged failure. Because defendant's petition does not show he was arguably prejudiced, we need not determine the reasonableness of trial counsel's actions. See *People v. Rucker*, 346 Ill. App. 3d 873, 885 (2003). For the foregoing reasons, we conclude that

defendant's petition failed to set forth the gist of a constitutional claim of ineffective assistance of counsel.

¶ 22 Defendant next contends that the trial court failed to examine the entirety of his petition within 90 days as required. He admits that the court entered a written order within 90 days of defendant's filing of his petition, but argues that the court failed to truly examine the petition where it misconstrued one of defendant's arguments.

¶ 23 The State responds that the trial court did examine the petition within 90 days.

¶ 24 The Act requires that "[w]ithin 90 days after the filing and docketing of each petition, the court shall examine such petition and enter an order thereon." 725 ILCS 5/122-2.1(a); see also *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). Our review remains *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 387-88 (1998).

¶ 25 The trial court clearly examined defendant's petition within the required 90 days. It issued a written, 12-page opinion addressing the petition in detail. Defendant's argument is not that the trial court did not examine the petition, but rather that it did not examine the petition carefully enough. Even if we accept defendant's contention that the trial court misread his *pro se* petition and applied the wrong standard, we review the judgment, not the reasoning of the trial court; we may affirm the trial court's judgment "for any appropriate reason regardless of whether the trial court relied on those grounds." *People v. Johnson*, 231 Ill. App. 3d 412, 419 (1992). As previously discussed, defendant's petition failed to set forth the gist of a constitutional claim of ineffective assistance of counsel, and therefore the dismissal was proper.

¶ 26 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 27 Affirmed.