2015 IL App (1st) 140616-U

FIFTH DIVISION
May 8, 2015

No. 1-14-0616

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. 12 CR 12744
	)	
PRESTON GRANDBERRY,	)	Honorable
	)	Michael McHale,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Palmer and Justice Reyes concurred in the judgment.

O R D E R

¶ 1 *Held:* The summary dismissal of defendant's postconviction petition was proper where the petition failed to allege an arguable claim of ineffective assistance of counsel.

¶ 2 Following a bench trial, defendant Preston Grandberry was found guilty of possession of a controlled substance and sentenced to two years' imprisonment. Defendant did not appeal. Defendant subsequently filed a petition for postconviction relief, which the trial court summarily dismissed. On appeal, defendant contends that he was denied the effective assistance of trial counsel. We affirm.

¶ 3 Defendant was charged, by information, with one count of possession of a controlled substance (heroin). No motion to suppress evidence appears in the common law record.

¶ 4 The following facts are taken from a report of proceedings attached to defendant's postconviction petition. The State does not dispute the accuracy of the attachment. On July 1, 2013, the trial court conducted a bench trial. Officer Aragon testified that on May 10, 2012, he was on patrol in a marked squad car with a partner. At approximately 11:30 p.m., he "curbed" a black BMW driven by defendant for a traffic violation. When defendant was unable to produce a driver's license or proof of insurance, Aragon asked him to exit the vehicle. Defendant began ripping a Ziploc bag containing a white powder, which spilled onto the seat, and refused to exit the vehicle. Aragon's partner forcibly removed defendant from the vehicle. Aragon looked into the car and saw three Ziploc baggies containing a white powder, which he suspected was heroin. Aragon placed the baggies into his pocket and kept them there until they were inventoried.

¶ 5 On cross-examination, Aragon testified that the BMW was an SUV, but could not recall whether the rear window was tinted. Aragon further testified that he could not see defendant's hands while they followed his BMW from behind in their squad car. Aragon admitted that he pulled defendant over for a seatbelt violation. When asked at what point he could see defendant's seatbelt, the State objected on the basis that there was "no motion," and the trial court sustained the objection based on relevance.

¶ 6 After a series of questions apparently intended to elicit information regarding registration of the BMW, the State agreed to stipulate that defendant did not own the vehicle. The parties also stipulated to the chain of custody and that testing of the substance recovered determined that it contained 1.2 grams of heroin.

¶ 7 The State rested and defendant moved for acquittal. Defendant argued:

> "We believe that the State has not proven beyond a reasonable doubt that [defendant] had any knowledge of any contraband in that vehicle in that when he was taken out of the vehicle, he was searched and nothing was found on him and at the time of – at the time that any contraband was found, he was actually in custody and I believe it was testified in the back of the squad car."

The State argued that it had proven "active" possession where defendant was seen ripping the bags prior to being taken out of the car. The trial court denied the motion and defendant rested without presenting evidence. Following brief additional argument, the trial court found defendant guilty of possession of a controlled substance.

¶ 8 On August 1, 2013, defendant filed a motion for a new trial, which the trial court denied. The trial court sentenced defendant to two years' imprisonment. Defendant did not file a notice of appeal.

¶ 9 On November 8, 2013, defendant, with the assistance of counsel, filed a petition for postconviction relief citing the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2012)). The petition included a single allegation of error, as follows:

> "6. Defendant was denied procedural due process of law as guaranteed by the 5th Amendment of the United States Constitution in that he received ineffective assistance of counsel because *inter alia*:
>
> a. His defense counsel failed to renew a motion to suppress at trial or in the alternative failed to file one entirely.
>
> b. Waived cross examination of Officer Daniel Aragon:
>
> c. Waived cross examination of the Prosecution's forensic chemist;

d. Failed to introduce any evidence on the defendant's behalf;

e. Failed to research case law on constructive possession and/or to argue the issue on defendant's behalf.

f. Failed to properly investigate the case or to develop evidence on Defendant's behalf."

The only attachment to defendant's postconviction petition was the report of proceedings mentioned earlier in this order.

¶ 10 The trial court, in a written order, summarily dismissed defendant's petition on January 31, 2014. Defendant timely appealed.

¶ 11 On appeal, defendant contends that he was denied the effective assistance of counsel and argues, citing *United States v. Cronic*, 466 U.S. 648, 658 (1984), that counsel's performance was so lacking in "meaningful adversarial testing," that we can presume prejudice without applying the familiar two-part standard of *Strickland v. Washington*¸ 466 U.S. 668, 687 (1984). The State responds that defendant has forfeited his claim by failing to follow appropriate appellate procedure. The State further contends that, if considered on its merits, defendant's claim of ineffective assistance of counsel fails.

¶ 12 We turn first to the State's forfeiture contention. "A postconviction petition is a collateral proceeding and not an appeal of the underlying judgment. Thus, postconviction relief 'is not a substitute for, or an addendum to, direct appeal.' " *People v. Stoecker*, 384 Ill. App. 3d 289, 291 (2008), quoting *People v. Kokoraleis*, 159 Ill. 2d 325, 328 (1994). Generally, issues which could have been raised on direct appeal, but were not, are procedurally defaulted. See *People v. Pitsonbarger*, 205 Ill. 2d 444, 455-56 (2002). However, although forfeiture bars consideration of ordinary trial error, errors which rise to the level of a constitutional violation are still cognizable

in a postconviction petition if the defendant did not take a direct appeal. *People v. Miranda*, 329 Ill. App. 3d 837, 842-43 (2002). Here, defendant has not procedurally defaulted review of his claim because the denial of the effective assistance of counsel is an issue of constitutional dimension.

¶ 13 At the first stage of a postconviction proceeding, as here, the circuit court must, within 90 days, review the petition and determine whether it is " 'frivolous or patently without merit.' " *People v. Hodges*, 234 Ill. 2d 1, 10 (2009) quoting *People v. Edwards*, 197 Ill. 2d 239, 244 (2001); 725 ILCS 5/122-2.1(a)(2) (West 2012). Where the effective assistance of counsel is at issue we are guided by the standard set forth in *Strickland*. When that standard is applied to the dismissal of a first stage postconviction petition the relevant question becomes whether "(i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *Hodges*, 234 Ill. 2d at 17. "However, nonfactual and nonspecific assertions which merely amount to conclusions are insufficient to require a hearing under the Post-Conviction Hearing Act." *People v. Burt*, 205 Ill. 2d 28, 35-36 (2001), citing *People v. Coleman*, 183 Ill. 2d 366, 381 (1998).

¶ 14 Defendant's petition first alleged that trial counsel was ineffective for failing to file a motion to suppress evidence. On appeal defendant argues that, because the rear window of the SUV was tinted, the officer would not have been able to observe the alleged seatbelt violation which prompted the stop which ultimately led to defendant's arrest and the seizure of the heroin. Appellate counsel faults trial counsel for failing to present an "affidavit or testimony from the owner of the vehicle regarding tinted glass." However, no affidavit is attached to defendant's postconviction petition. If a defendant alleges ineffective assistance of counsel based on the failure to investigate and call a witness, the postconviction petition must be supported by an

affidavit from the proposed witness (*People v. Harris*¸ 224 Ill. 2d 115, 142 (2007) citing *People v. Enis*, 194 Ill. 2d 361, 380 (2000)) or state why such an affidavit could not be procured (see *People v. Hall*, 217 Ill. 2d 324, 333 (2005); 725 ILCS 5/122-2 (West 2012)). Here, defendant's petition does not even identify the potential witness. It is only on appeal that defendant speculates that the still unidentified owner of the car would have been able to provide some testimony about window tinting that might have impeached the arresting officer's testimony. Without the type of supporting documentation contemplated by the postconviction process, defendant's claim is entirely speculative and must be rejected.

¶ 15 Defendant's petition also alleges that counsel was ineffective for waiving cross-examination of Officer Aragon. A claim is frivolous or patently without merit where it is " 'completely contradicted by the record.' " *People v. Hernandez*, 2014 IL App (2d) 131082, ¶ 6, quoting *Hodges*, 234 Ill. 2d at 16. Here, the report of proceedings clearly contains cross-examination of Officer Aragon, in direct contradiction of defendant's claim that trial counsel "waived" cross-examination of the officer. Therefore, the trial court did not err when it found this claim frivolous or patently without merit.

¶ 16 Defendant's third allegation of error is that trial counsel waived cross-examination of the State's forensic chemist. The parties stipulated to the composition of the heroin, and no forensic chemist testified, so this allegation of error is likewise rebutted by the record. To the extent defendant is alleging that trial counsel was ineffective for stipulating to the evidence, this is a routine practice in the criminal courts, and defendant's petition does not allege anything that could have been used to impeach the chemist's testimony, a deficiency in the testing procedures, or any other facts from which we could conclude that defendant was prejudiced by the decision to stipulate to the evidence. Therefore, we find this allegation is meritless.

¶ 17 Defendant's final three allegations all fail for lack of specificity. See *Burt*, 205 Ill. 2d at 35-36. Defendant alleges that trial counsel failed to: introduce evidence; research and argue constructive possession; and properly investigate his case. However, defendant's petition alleges no facts in support of these allegations. He does not, for example, identify the evidence trial counsel should have introduced, set forth the precedent proper research would have revealed or the argument that could have been based thereon, or identify the facts or evidence additional investigation would have revealed. Accordingly, we reject these allegations.

¶ 18 Defendant argues, on appeal, that the cumulative effect of the errors he identified constituted a complete lack of "meaningful adversarial testing" such that, pursuant to *Cronic*, he is relieved of the burden of establishing *Strickland* prejudice. The difference between *Strickland* and *Cronic* is one of kind not degree. *People v. Cherry*, 2014 IL App (5th) 130085, ¶ 26, appeal allowed No. 118728 (Mar. 25, 2015), citing *Bell v. Cone*, 535 U.S. 685, 697 (2002). In other words, unless the alleged error is of a certain type, such as insisting on an unavailable defense (see *People v. Kozlowski*, 266 Ill. App. 3d 595 (1994)), no matter how egregious or numerous defense counsel's errors, the *Strickland* standard applies. Here, defendant alleges no error of a type recognized as C*ronic* error. Instead, he simply alleges a series of *Strickland* type errors. We have examined these allegations individually and find each to be meritless. More importantly, a list of *Strickland* errors cannot be transformed, because of its length, into a *Cronic* error.

¶ 19 Therefore, for the reasons stated above, we conclude that the trial court did not err when it dismissed defendant's postconviction petition. The judgment of the circuit court of Cook County is affirmed.

¶ 20 Affirmed.