

2015 IL App (2d) 131192-U  
No. 2-13-1192  
Order filed September 14, 2015

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Du Page County.
	)	
Respondent-Appellee,	)	
	)	
v.	)	No. 08-CF-1084
	)	
TROY L. CAMPBELL,	)	Honorable
	)	Daniel P. Guerin,
Petitioner-Appellant.	)	Judge, Presiding.

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PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.  
Justices Zenoff and Spence concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court erred in dismissing the defendant's postconviction petition.

¶ 2 Following a bench trial, the defendant, Troy Campbell, was convicted of controlled substance trafficking (720 ILCS 570/401.1(a) (West 2008)) and was sentenced to 24 years' imprisonment. This court affirmed the defendant's conviction and sentence on direct appeal. See *People v. Campbell*, 2011 IL App (2d) 100015-U. On February 22, 2012, the defendant filed a postconviction petition. The defendant alleged that he was deprived of his constitutional right to the effective representation of both trial and appellate counsel because his attorneys

failed to argue that the evidence against him should have been suppressed as the result of an unlawful search. On October 18, 2013, the trial court dismissed the defendant's petition. The defendant appeals from that order. We reverse and remand for additional proceedings.

¶ 3

### BACKGROUND

¶ 4 In May 2008, the defendant was charged along with his cousin, Cherese Smith, with controlled substance trafficking (720 ILCS 570/401.1(a) (West 2008)). The charges arose from the discovery of methylenedioxymethamphetamine (MDMA) inside a car in which Smith was driving and the defendant was a passenger.

¶ 5 Smith and the defendant were tried separately. Their cases were assigned to the same judge. On January 8, 2009, the trial court (Judge Peter Dockery) conducted a hearing in Smith's case on her motion to suppress the evidence against her. Witnesses described how, acting on a tip from an unnamed source, the police placed a GPS tracking device on Smith's car. A police team then monitored the car as it traveled from Du Page County to the Detroit area. The police observed a white bag being transferred to the back seat of Smith's car. When the car returned to Illinois, the police followed the car until it was observed speeding and changing lanes without signaling in the area around York Road on I-290. The car was pulled over. The police observed the defendant making "furtive movements" in the back seat. Both Smith (who was the driver) and the defendant were ordered out of the car. The police discovered a small amount of cannabis in the defendant's sock, and placed him under arrest. The police then drove Smith's car to a more secure location at a nearby strip mall. Upon searching the vehicle, the police discovered a white bag containing a quantity of pills believed to be MDMA, commonly known as Ecstasy.

¶ 6 The trial court granted Smith's motion to suppress, ruling that the information from the unnamed informant did not give the police probable cause or a reasonable articulable suspicion

to stop the car. The trial court stated that the suspicious conduct that the police observed while Smith was in the Detroit area provided the police only with “a hunch” that illegal conduct was taking place. The trial court found that, while the police may have observed Smith committing some traffic violations, thereby justifying stopping the vehicle and moving the vehicle to a safer location, the police lacked probable cause to believe that there were controlled substances inside the car. The trial court specifically rejected the State’s argument that the defendant’s actions gave the police reason to search the vehicle. The trial court explained:

“The finding of cannabis upon Troy Campbell at his ankle after the officers observed him reaching down to his ankle while he was on the left side of the rear passenger seat did not provide probable cause to believe that there was cannabis elsewhere in the car. The issue is whether pursuant to the arrest of Campbell the officers could search the entirety of the passenger compartment incident to that arrest, regardless of whether Campbell’s arrest was legal and patting him down and finding cannabis upon his person. And I find that he was observed actively furtively in reaching down to his ankle and then repeatedly refusing to get out of the car so as to justify the officers fearing for their safety such that they could properly pat him down in a search not for contraband but for weapons.

\* \* \*

Campbell was arrested on that expressway and removed from the car before it was driven away to the strip mall, \*\*\* Campbell’s arrest did not then justify searching the car anymore than if the car had been taken to the police station and searched. Whereas, in some instances taking the car to the police station for a search might be justified as an

inventory search, here there was no justification for an inventory search based upon the arrest of Campbell.

\* \* \*

[T]he search of the vehicle cannot be justified [as a] search of the vehicle for weapons that might have been accessible to Campbell at the time of his arrest. Instead, it's clear that the officers searched that car because they believed they had grounds to do so based upon an informant's tip. And that tip was not a justification for searching the defendant's car."

¶ 7 Although the trial court suppressed the evidence against Smith, the defendant's counsel did not file a motion to suppress on his behalf.

¶ 8 On September 1, 2009, the trial court conducted a bench trial on the charges against the defendant. Detective Richard Arsenault of the Naperville police department testified about receiving information from an informant about Smith and the defendant. After receiving that information, Detective Arsenault placed a GPS tracking device on Smith's vehicle.

¶ 9 Detective Michael Moore of the Royal Oak police department in Michigan testified that he received information on April 18, 2008, that a car was traveling from Chicago to Detroit to purchase narcotics. After placing the car under surveillance and while in Detroit, he observed someone pass a white bag through the rear window of the car where the defendant was sitting. He then observed the car drive away.

¶ 10 Detective Brett Heun, a Naperville police officer assigned to the Drug Enforcement Administration, testified that he participated in a traffic stop of the vehicle in which the defendant was riding on April 18, 2008, at 9:15 p.m. The vehicle was stopped for traffic violations. As he approached the passenger side window, he observed the defendant in the back

seat, reaching toward his ankles. The defendant claimed that his feet were stuck. However, Detective Heun observed no such obstruction. After the defendant refused to follow orders and step out of the car, he was removed by another police officer. After a search of the defendant, the police discovered a green leafy substance in his sock, which appeared to be cannabis. The defendant was then arrested and the car was searched. The police subsequently discovered 700 pills in a white plastic bag. Six hundred of the pills tested positive for the presence of MDMA.

¶ 11 Detective Heun testified that he interviewed the defendant at the Naperville Detention Center following his arrest. After waiving his rights, the defendant acknowledged that he had purchased MDMA pills from a connection of his in Detroit.

¶ 12 Following the State's case, the defense rested without presenting any evidence. The trial court found the defendant guilty on both counts of the indictment.

¶ 13 On October 5, 2009, defense counsel filed a motion for a new trial. The motion alleged that the physical evidence in the case was illegally seized and should not have been admitted. Defense counsel pointed out that Smith's motion to quash and suppress evidence had been granted and that the State subsequently dismissed the charges against her. The trial court denied the motion for a new trial, stating that evidence that is suppressed as to one defendant is not necessarily suppressible as to another defendant.

¶ 14 Following the denial of his posttrial motions, the trial court sentenced the defendant to 24 years' imprisonment. Following the denial of his motion to reconsider sentence, the defendant filed a timely notice of appeal. This court affirmed the defendant's conviction and sentence. *Id.*

¶ 15 On February 22, 2012, the defendant filed a *pro se* petition for post-conviction relief. The petition alleged that trial counsel was ineffective for failing to move to suppress the evidence seized from the car, and that appellate counsel was ineffective for not raising the claim

on direct appeal. The trial court (Judge Daniel Guerin) found that the defendant had asserted the gist of a constitutional claim and appointed counsel to represent him.

¶ 16 On October 17, 2012, defense counsel filed an amended postconviction petition. The State filed a motion to dismiss the petition, arguing that the issues were waived because the defendant knew about the issues and could have raised them in the direct appeal. On February 11, 2013, the trial court denied the State's motion to dismiss on waiver grounds and directed the State to file a formal answer to the substantive issues in the amended petition.

¶ 17 On October 18, 2013, the trial court dismissed<sup>1</sup> the amended petition, explaining that the police search of the car was reasonable in light of the defendant's "furtive movements" in the back seat. The defendant thereafter filed a timely notice of appeal.

¶ 18

#### ANALYSIS

¶ 19 The defendant argues on appeal that his trial counsel and appellate counsel were ineffective because there was a substantial basis for challenging the search and seizure of the contraband in question. The defendant insists that such a substantial basis is apparent because his codefendant was able to have the same evidence suppressed. The defendant therefore

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<sup>1</sup> In its order, the trial court indicated that the defendant's petition was "denied" rather than "dismissed." The State argues that this indicates the trial court actually treated the defendant's petition as being at the third stage of the postconviction proceedings. The State's argument is without merit. Although the trial court "denied" the petition, it did so in response to the State's motion to dismiss the petition. The trial court also specifically stated that the case was "set for ruling on a second stage postconviction petition." Accordingly, we will consider the defendant's petition as being dismissed after the second stage of the postconviction proceedings.

contends that his petition should be remanded for an evidentiary hearing pursuant to the third stage of the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 (West 2012)).

¶ 20 The Act provides a remedy to criminal defendants who have had substantial violations of their constitutional rights during their criminal trial. See *People v. Vernon*, 276 Ill. App. 3d 386, 391 (1995). A postconviction proceeding is not an appeal *per se*, but a collateral attack upon a final judgment. See *People v. Lester*, 261 Ill. App. 3d 1075, 1077 (1994). The trial court must review the petition within 90 days, and may summarily dismiss it if the court finds that it is frivolous and patently without merit. *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006). If the petition is not dismissed during this period, the trial court will docket it for further proceedings. *Id.*

¶ 21 Once a petition reaches the second stage, the defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Coleman*, 206 Ill. 2d 261, 277 (2002). Also at the second stage, all well-pleaded facts are taken as true unless they are positively rebutted by the trial record. *Pendleton*, 223 Ill. 2d at 473. Mere conclusions cannot serve as the basis for postconviction relief. *People v. Coleman*, 183 Ill. 2d 366, 381-82 (1998).

¶ 22 As to the defendant's claim that he was deprived of the effective assistance of counsel, the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), apply. *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984). To succeed on such a claim, a defendant must show both that his counsel's performance "fell below an objective standard of reasonableness" (*Strickland*, 466 U.S. at 688) and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (*Id.* at 694). To satisfy the first portion of the *Strickland* test, a defendant must show that his attorney's performance fell below an objective standard as measured by prevailing professional norms.

*People v. Spann*, 332 Ill. App. 3d 425, 430 (2002). There is a strong presumption, which a defendant must overcome, that counsel's performance "falls within the wide range of reasonable professional assistance." *People v. Miller*, 346 Ill. App. 3d 972, 982 (2004). Decisions involving judgment, strategy, or trial tactics will not support a claim of ineffective assistance. *People v. Lindsey*, 324 Ill. App. 3d 193, 197 (2001). Further, a reviewing court may dispose of an ineffectiveness claim on the prejudice prong alone by determining that the defendant was not prejudiced by counsel's representation. *People v. Munson*, 171 Ill. 2d 158, 184 (1996).

¶ 23 Failure to file a motion to suppress may constitute ineffective assistance of counsel. The question of whether to file a motion to suppress evidence is traditionally considered a matter of trial strategy. *People v. Brannon*, 2013 IL App (2d) 111084 ¶ 35. To prevail on a claim that trial counsel was ineffective for failing to file a motion to suppress, a defendant must show a reasonable probability that the motion would have been granted and the trial outcome would have been different. *People v. Bailey*, 375 Ill. App. 3d 1055, 1059 (2007). A defendant's appeal depends on the merits of the motion to suppress that he proposes trial counsel should have presented. *Brannon*, 2013 IL App (2d) 111084 ¶ 34. The failure to file a motion to suppress does not establish incompetent representation when the motion would have been futile. *People v. Wilson*, 164 Ill. 2d 436, 454 (1994).

¶ 24 Here, we believe that the defendant has made a substantial showing that he was deprived of his constitutional rights to the effective assistance of trial counsel. As (1) the evidence against Smith and the defendant was almost identical and (2) in suppressing the evidence against Smith, the trial court specifically stated that the defendant's arrest did not justify a search of the vehicle, there is reasonable probability that had defense counsel filed a motion to suppress, it would have been granted. Further, since the evidence at issue (600 Ecstasy pills) served as the basis of the

controlled substance trafficking charge against the defendant, there is a reasonable probability that the outcome of the trial would have been different had that evidence been suppressed. Accordingly, we must remand for additional proceedings pursuant to the third stage of the Act. *Bailey*, 375 Ill. App. 3d at 1059.

¶ 25 In so ruling, we reject the State's argument that the defendant forfeited this issue by not raising it on direct appeal. As the defendant also argues that he was deprived of effective assistance of appellate counsel due to that counsel's failure to raise this issue on appeal, he has preserved that issue for our review. See *People v. Moore*, 402 Ill. App. 3d 143, 146 (2010) (it is well established that a postconviction claim will not be forfeited where the alleged forfeiture stems from the incompetence of appellate counsel).

¶ 26 We also reject the State's argument that we should adopt Judge Guerin's rationale in dismissing the defendant's postconviction petition, and thereby reject Judge Dockery's rationale in granting Smith's motion to suppress. We agree with the defendant that the "record can be read as to conclude that the full extent of the facts surrounding the police conduct in this case has not yet been presented to a judge in this case and an evidentiary hearing is the appropriate remedy here." As such, we remand for additional proceedings consistent with the Act.

¶ 27 **CONCLUSION**

¶ 28 For the reasons stated, the judgment of the circuit court of Du Page County is reversed and remanded for additional proceedings consistent with this order.

¶ 29 Reversed and remanded.