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2015 IL App (3d) 130302-U

Order filed May 27, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal Nos. 3-13-0302, 3-13-0303, 3-14-0069 and 3-14-0070
)	Circuit Nos. 12-CF-539 and 12-CF-1548
RODERICK D. HERTE,)	Honorable
Defendant-Appellant.)	Gerald R. Kinney and Robert P. Livas, Judges, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Lytton and O'Brien concurred in the judgment.

ORDER

- ¶ 1 *Held:* (1) Trial court's hearing on defendant's *pro se* motions for return of property was sufficient. (2) Defendant's *pro so* petition for postconviction relief was properly dismissed.
- ¶ 2 Following a negotiated guilty plea, defendant, Roderick D. Herte, sought return of certain property seized by the police, pursuant to his plea agreement. At a hearing on the issue, the trial court determined the extent of defendant's agreement with the State with respect to the seized property, and enforced said agreement. Defendant appeals from that ruling. Defendant also

appeals from the first-stage dismissal of his *pro se* postconviction petition, in which he again argued that his property should be returned. Defendant's direct appeals and postconviction appeals have been consolidated. We affirm.

¶ 3

FACTS

¶ 4

Defendant pled guilty to unlawful use of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2012)) in case No. 12-CF-539. In the same plea proceeding, defendant pled guilty to two counts of forgery (720 ILCS 5/17-3(a)(2) (West 2010); 720 ILCS 5/17-3(a)(2) (West 2012)) and one count of deceptive practices (720 ILCS 5/17-1(B)(2) (West 2012)) in case No. 12-CF-1548.

The prosecutor outlined the proposed plea agreement:

"The agreed disposition purports that the defendant will serve, of course subject to [the court's] approval, five years in the Department of Corrections. There will be destruction of the weapon or use for police use and other items that were seized. There is an exception for jewelry. There is status on the jewelry and a \$3,000 judgment for restitution."

Following admonitions and a factual basis, the court accepted defendant's guilty plea.

¶ 5

Sentencing was held less than four weeks after the plea hearing. At sentencing, the prosecutor again outlined the plea agreement, explaining that defendant would receive a term of five years' imprisonment, pay \$980 in court costs, and pay \$3,000 in restitution. The prosecutor did not mention any seized property. Defense counsel then informed the court that defendant had prepared a number of *pro se* motions seeking the preservation and return of certain personal property seized by the Naperville police department. Defense counsel noted that he would not be representing defendant on that motion. The court imposed the concurrent terms of imprisonment pursuant to the agreement and set a date for hearing on the *pro se* motions.

¶ 6 Defendant's various *pro se* motions contained a number of similar allegations. Defendant maintained that "[t]he State, in its Answer to Discovery, disclosed the existence of papers, computers, phones, tablets, electronics, weapons, and other items, some of which are not known to the Defendant." Defendant alleged that "[m]ost of these items were inventoried by the police and are listed in the Discovery's [*sic*] Order of Custody of Seized Articles. Some items are intentionally missing thus making this document inaccurate." Defendant averred that the items seized but not accounted for on the inventory were referenced by Naperville police officers "during the initial arrest stage as well as during 'off the record' conversations in the courtroom." Defendant further claimed that "the items seized contain[ed] material that [was] exculpatory of the Defendant and/or tend[ed] to mitigate the offense, and/or may [have been] used for impeachment purposes, and/or [was] necessary for the preparation of the defense." The record in this case does not contain a police inventory, nor does it contain any reference to the seized items mentioned in defendant's motions.

¶ 7 At the hearing on his motions, defendant admitted that the items sought did not appear on the police inventory, but speculated that they might be visible on the DVD video of the police raid on his house. Defendant did not introduce any evidence at the hearing. The prosecutor informed the court that the plea agreement included the return of defendant's wedding jewelry and the police use or destruction of all other materials. Defendant claimed that the agreement contemplated the destruction of only the weapon. The court opined that it would be difficult to enter an order for the return of property for which there was no proof of existence. The court granted the motion for return of property with respect to the wedding jewelry, but denied it for all other purposes.

¶ 8 Defendant appealed the court's order denying his motion for return of property. While

the appeal was pending, defendant filed a *pro se* petition for postconviction relief in the trial court. In his petition, defendant maintained that the State had misled the court in regard to the terms of the plea agreement. He sought specific performance of the original agreement. Defendant attached to his petition a letter from the prosecutor to defense counsel relaying a plea offer. In the letter, the State offered to recommend a sentence of seven years' imprisonment and, *inter alia*, the destruction or law enforcement use of the weapon. The offer in the letter did not contemplate the disposition of any other seized property.

¶ 9 The trial court found defendant's petition frivolous and patently without merit, dismissing it as to both cases. Defendant appealed, and this court consolidated defendant's direct appeals with those appeals from dismissal of his postconviction petition.

¶ 10

ANALYSIS

¶ 11

I. Direct Appeal

¶ 12

On direct appeal from the denial of his motion for return of property, defendant does not argue that the trial court's decision on that motion was contrary to the manifest weight of the evidence. Instead, defendant contends that the court's consideration of that motion "was insufficient to determine the exact agreement between the parties as to the disposition of the seized property." In turn, defendant urges that we remand the matter so that the trial court may determine what the agreement was and enforce said agreement. Upon review, we find defendant's direct appeal lacks merit in light of the fact that he failed to present the trial court with any evidence of the alleged seized property.

¶ 13

In support of his contention that the hearing on his motion was insufficient, defendant points out that defense counsel was not asked his recollection of the agreement, and the trial court did not insist that counsel or any other person testify. Defendant maintains that after the

hearing, "uncertainty remained as to what the parties' agreement was."

¶ 14 "The general rule is that, during the progress of an action, the movant bears the burden of sustaining the grounds of his motion and the other party is put to the necessity of producing evidence to meet and outweigh or counterbalance that of the moving party." *People v. Smith*, 248 Ill. App. 3d 351, 358 (1993). Thus, the initial burden in this case was on defendant to make a *prima facie* case that: (1) the property in question actually existed and was seized by the police, and; (2) the plea agreement included the return of that property. While defendant speculates on appeal that defense counsel's testimony may have been helpful at the hearing, it was defendant who failed to call counsel as a witness. Defendant also failed to introduce documents, such as the police inventory report or the State's answer to discovery—both of which defendant mentioned in his motions—that might have gone toward proving the existence of the property in question. We refuse to attribute defendant's strategic errors to the trial court.

¶ 15 Defendant maintains that this court should follow the lead of *People v. Starks*, 106 Ill. 2d 441 (1985), in which our supreme court remanded the matter for a new hearing to determine the existence of a pretrial agreement between the parties. In *Starks*, the defendant was convicted of armed robbery following a jury trial. *Id.* at 443. In a posttrial motion, the defendant alleged that there had been an agreement that the State would dismiss the charge if he passed a polygraph test. *Id.* at 444. The trial court refused to consider the issue though, apparently under the belief that any sort of polygraph evidence was barred by law. *Id.* at 446. The supreme court remanded the case so the trial court could hold an evidentiary hearing to determine if there was an agreement relating to the polygraph test, and to enforce said agreement if it existed. *Id.* at 453.

¶ 16 *Starks* is plainly distinguishable from the case at hand. In *Starks*, the trial court "refused to consider the pretrial agreement regarding the polygraph examination and refused to allow

counsel to make any record pertaining to the agreement." *Starks*, 106 Ill. 2d at 446. Thus, when the supreme court remanded for a hearing on the issue, the evidentiary hearing would be conducted for the first time. Here, however, the trial court ruled on the merits, finding that the parties' plea agreement contemplated only the return of the jewelry. In *Starks*, the defendant never received an opportunity to be heard regarding the agreement; in this case, defendant was given a hearing on his *pro se* motion, but failed to meet his burden of persuasion. While the defendant in *Starks* sought his first evidentiary hearing, defendant here essentially asks for a second bite at the apple. Such relief is unwarranted.

¶ 17

II. Postconviction Appeal

¶ 18

On appeal from the dismissal of his postconviction petition, defendant argues that the petition set forth the gist of a constitutional claim, and therefore was erroneously dismissed at the first stage of postconviction proceedings. Specifically, defendant contends that his constitutional claim that he did not receive the benefit of his bargain with the State was sufficient to advance to second-stage proceedings. We find that the issue of defendant's receipt of the benefit of his bargain was previously decided at the trial level. Accordingly, we conclude that dismissal of defendant's postconviction petition was proper.

¶ 19

The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)) provides a statutory remedy to criminal defendants claiming substantial violations of their constitutional rights at trial. *People v. Edwards*, 2012 IL 111711.

"Considerations of *res judicata* and waiver limit the range of issues available to a post-conviction petitioner 'to constitutional matters which have not been, and could not have been, previously adjudicated.' [Citation.] Thus, rulings on issues that were previously raised at trial or on direct appeal are *res judicata*, and issues

that could have been raised in the earlier proceedings, but were not, will be deemed waived." *People v. Tenner*, 175 Ill. 2d 372, 378 (1997) (quoting *People v. Winsett*, 153 Ill. 2d 335, 346 (1992)).

The doctrines of *res judicata* and forfeiture may be invoked by a trial court to dismiss a postconviction petition at the first stage of proceedings. *People v. Blair*, 215 Ill. 2d 427, 442-43 (2005). A defendant may not seek relief under the Act simply by "rephrasing previously addressed issues in constitutional terms." *People v. Flores*, 153 Ill. 2d 264, 277 (1992) (quoting *People v. Gaines*, 105 Ill. 2d 79, 90 (1984)).

¶ 20 A claim that a defendant has not received the benefit of his plea bargain with the State is undoubtedly one of constitutional dimension. See *People v. Whitfield*, 217 Ill. 2d 177, 183-87 (2005). Such a claim, however, requires that a court determine the extent of the agreement between the parties and then enforce that agreement.¹ E.g., *People v. Boyt*, 109 Ill. 2d 403 (1985); *People v. Lenoir*, 2013 IL App (1st) 113615. In the present case, the trial court addressed exactly those issues at the hearing on defendant's *pro se* motions; it determined that the plea agreement only contemplated the return of jewelry, and thus enforced the agreement by ordering the return of said jewelry. In other words, although not couched in constitutional terms at the time, defendant's receipt of the benefit of his bargain was already litigated at the trial level. Defendant's constitutional claim is thus a mere rephrasing of a previously raised issue, and is barred *res judicata*.

¹If dictated by fundamental fairness, courts may grant a defendant leave to withdraw his guilty plea rather than enforcing the bargain. *Whitfield*, 217 Ill. 2d at 202-03. In his postconviction petition, defendant sought specific performance of his agreement with the State.

¶ 21 We note that the trial court dismissed defendant's postconviction petition on the grounds that it was frivolous and patently without merit. However, this court may affirm the judgment of the trial court on any grounds supported by the record. See *In re Detention of Stanbridge*, 2012 IL 112337, ¶ 74. Because defendant's benefit of the bargain claim was *res judicata*, we affirm the trial court's dismissal of defendant's postconviction petition.

¶ 22 CONCLUSION

¶ 23 The judgments of the circuit court of Will County are affirmed.

¶ 24 Affirmed.