2015 IL App (4th) 130297-U

NO. 4-13-0297

FILED
February 19, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
DAMARCUS D. TRIPLETT,	)	No. 08CF167
Defendant-Appellant.	)	
	)	Honorable
	)	Jennifer H. Bauknecht,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Knecht and Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant stated the gist of a constitutional claim of ineffective assistance of counsel where defendant's street-value fine was increased due to counsel's arguably unreasonable performance.

¶ 2 In December 2012, defendant, Damarcus D. Triplett, filed a *pro se* postconviction petition, alleging, *inter alia*, ineffective assistance of trial counsel. In March 2013, the Livingston County circuit court dismissed defendant's petition as frivolous and patently without merit. Defendant appeals, asserting the trial court erred by summarily dismissing his postconviction petition because he did state the gist of a constitutional claim of ineffective assistance of counsel. We reverse and remand for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 In July 2008, the State charged defendant by information with one count of unlawful possession with the intent to deliver a controlled substance (720 ILCS 570/401(a)(2)(B)

(West 2008)). The State's information alleged that, on July 9, 2008, defendant knowingly possessed with the intent to deliver 100 grams or more but less than 400 grams of a substance containing cocaine. It further noted that, due to defendant's prior conviction for violating the Illinois Controlled Substances Act (720 ILCS 570/arts. I to VI (West 2008)) (People v. Triplett, No. 03-CF-233001 (Cir. Ct. DuPage Co.)), defendant could receive a sentence of up to 80 years' imprisonment. See 720 ILCS 570/408(a) (West 2008). At defendant's July 16, 2008, preliminary hearing, Officer Sam Fitzpatrick testified that, on the evening of July 9, 2008, he was on patrol with Deputy Jason Draper when they noticed a tan-colored Audi without a front license plate traveling south on Interstate 55. They followed the car, stopped it, and learned defendant was the driver. The officers later discovered cocaine on defendant's front passenger, David Walker, and $3,000 in cash on defendant's backseat passenger, Tavell Jackson. The trial court found probable cause existed defendant committed the charged offense. At the end of the hearing, the court asked if the parties wanted the case on the November calendar, and defense counsel replied, "That's fine, judge." The State agreed but noted the case was going to take some preparation.

¶ 5 On August 8, 2008, the trial court held a bond-reduction hearing and reduced defendant's bond to $10,000, which defendant posted. At the October 2008 pretrial hearing, the State indicated it was not ready for trial, and the court asked if the case should be continued to the January 2009 calendar. Defense counsel stated he had no objection and noted the continuance would be by agreement. It was noted on the record Jackson was in custody and his bench trial was set for November 2008. At the December 2008 pretrial hearing, defense counsel indicated he was ready for trial and noted defendant wanted to waive his right to a jury trial. The court then scheduled the bench trial for March 2009. Defense counsel had noted defendant was

out on bond, so they were not in a "particular hurry." The State did not mention the absence of a key witness at the pretrial hearing.

¶ 6 On December 19, 2008, the State filed a motion for an evidence deposition of Deputy Draper, the arresting officer that seized the alleged cocaine from Walker. The motion noted Deputy Draper would be unavailable to testify at the bench trial because he was leaving the state on December 28, 2008, for active military duty and was not expected to return for nine months to a year. A hearing on the motion was set for December 22, 2008. The docket sheet does not contain a hearing entry for December 22, 2008. On February 26, 2009, the State filed a motion to continue the March 2009 trial date based on Deputy Draper's absence.

¶ 7 On March 3, 2009, the trial court heard the State's motion to continue. The discussion between court and counsel indicated defense counsel could not make the December 22, 2008, hearing date. In Walker's case, the parties were able to get an evidence deposition, and the case proceeded to trial in January 2009. The court granted the State's continuance, and on March 5, 2009, defendant filed his demand for a speedy trial.

¶ 8 On July 23, 2009, the State filed a motion for a continuance beyond the statutory speedy-trial term. The motion noted defendant's term was set to expire on August 11, 2009 (a day short because the motion erroneously stated the speedy-trial demand was made on March 4, 2009), and Deputy Draper was still unavailable due to his active military service overseas. According to military personnel, Deputy Draper was set to return on or around August 14, 2009. On July 28, 2009, the trial court held a hearing on the State's motion to continue, granted an extension of the speedy-trial period to August 28, 2009, and scheduled the bench trial for August 25, 2009. The court later reset the hearing for August 26, 2009. On August 26, 2009, defendant made a motion to continue the trial due to defense counsel's commitment in another case. The

court then continued the case to October 2009.

¶ 9 In October 2009, the trial court commenced defendant's bench trial. During the trial, the State moved to admit an August 2008 laboratory report of the Illinois State Police forensic science laboratory pursuant to a stipulation, and defense counsel stated, "[N]o objection." The trial court then admitted the laboratory report. The laboratory report stated the items submitted where (1) "124.0 grams of white powder" and (2) "129.7 grams of two plastic bags containing white powder." As to findings, the report stated the 124 grams was cocaine, and "no analysis" was performed on the 129.7 grams.

¶ 10 The State also presented the testimony of Deputy Draper and Officer Fitzpatrick. Deputy Draper testified that, at around 8:12 p.m. on July 9, 2008, he observed a car on southbound Interstate 55 without a front license plate. He was driving the police vehicle, which was parked on a southbound ramp. Officer Fitzpatrick was his passenger. Once they observed the car without the front license plate, they began to follow it. Deputy Draper eventually pulled up along the side of the vehicle and went to the front of it to make sure it was missing a license plate. He then dropped back along the side of the vehicle for two or three miles. After that, Deputy Draper went back behind the vehicle. Before he stopped the vehicle he observed it commit a lane violation twice. Deputy Draper explained both sides of the vehicle's tires hit the lines, rode on the lines, and then came back off. He never observed the vehicle speeding, and the squad car was going 54 to 58 miles per hour. Deputy Draper stopped the vehicle and learned defendant was the driver. Officer Fitzpatrick testified they began following the car because it lacked a front license plate. No questions were asked of him regarding other possible traffic violations.

¶ 11 Additionally, Deputy Draper testified that, after defendant was placed in the

police vehicle, he asked Walker to step out of the car. While Deputy Draper talked to Walker, he noticed Walker was very nervous and very worried, and so Deputy Draper asked for permission to search him. Walker became very animated, and he lifted up his shirt and patted his pants. Deputy Draper again asked to search Walker, and Walker permitted the search. When Deputy Draper patted Walker's pocket, he felt a huge lump in the pocket, and Walker tensed up. In his front left pocket, Walker had one big Baggie with a large, white substance in it. In the front right pocket were two small Baggies containing a white substance.

¶ 12 Defendant's codefendants also testified at his trial. Walker testified he went along with defendant on a ride to Chicago, and while there, defendant left him. When he returned to the car, defendant was carrying a pair of shoes in a shoe box. Defendant put the shoe box on the front-passenger floorboard near Walker's feet. Walker did not look at the shoes. He was high on heroin provided by defendant and went to sleep. On direct testimony, Walker testified the police had to wake him up. After the police had stopped them, defendant told him to reach down, pick up "the stuff" that was in the shoes, and put it in his pocket. Walker did so because he thought it was just a traffic stop. On cross-examination, Walker testified defendant had tapped him on the leg, woke him up when the police were behind them, and told him to put "the stuff" from the shoes into his pocket. "The stuff" was three bags containing a white powdery substance that looked like cocaine.

¶ 13 Jackson testified defendant picked him up in Chicago to take him to buy a car in Peoria. Defendant had a front-seat passenger that Jackson did not know. The passenger asked defendant to make a stop. Defendant stopped, and the passenger went in. After being inside for six to seven minutes, the passenger returned to the car. Additionally, Jackson first testified he did not recall any mention of "bags" before the front-seat passenger was arrested. After being

presented with his testimony from Walker's trial, Jackson testified he heard defendant tell the front-seat passenger, "get the bag." Jackson stated it could have been "bags," which is what the transcript for Walker's trial states. Jackson thought defendant was referring to cannabis or some loose bags.

¶ 14 At the conclusion of the trial, the trial court found defendant guilty of the charge. Defendant filed a motion for a new trial. At a joint January 2010 hearing, the court denied defendant's posttrial motion and proceeded to a sentencing hearing. At the sentencing hearing, Inspector Mike Willis testified the street value of cocaine at the time of the offense was $100 per gram, and approximately 254 grams of cocaine was seized in this case. Thus, Inspector Willis opined the street value of the cocaine in this case was $25,400. The court sentenced defendant to 40 years' imprisonment and ordered him to pay a street-value fine of $25,400. Defendant filed a motion to reconsider his sentence, which the court denied.

¶ 15 Defendant appealed and asserted (1) the trial court erred by granting the State's request for an extension of the speedy-trial term, (2) the State failed to prove beyond a reasonable doubt defendant possessed the cocaine, and (3) his sentence was excessive. This court affirmed the Livingston County circuit court's judgment. *People v. Triplett*, 2011 IL App (4th) 100262-U. In November 2012, the Illinois Supreme Court denied defendant's petition for leave to appeal. *People v. Triplett*, 2012 IL 113504, 968 N.E.2d 87.

¶ 16 On December 28, 2012, defendant filed his *pro se* postconviction petition with exhibits, raising more than 30 claims of error. On March 14, 2013, the trial court dismissed defendant's postconviction petition at the first stage of the proceedings.

¶ 17 On April 8, 2013, defendant filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 606 (eff. Feb. 6, 2013). See Ill. S. Ct. R. 651(d)

(eff. Feb. 6, 2013) (providing the supreme court rules governing criminal appeals apply to appeals in postconviction proceedings). Accordingly, this court has jurisdiction under Illinois Supreme Court Rule 651(a) (eff. Feb. 6, 2013).

¶ 18 II. ANALYSIS

¶ 19 In this appeal, defendant challenges the trial court's dismissal of his *pro se* postconviction petition at the first stage of the proceedings. Specifically, defendant argues his trial counsel was ineffective because counsel (1) erroneously stipulated to the existence of 129.7 grams of cocaine, (2) failed to earlier file a speedy-trial demand, and (3) failed to file a motion to suppress. The State contends the trial court's dismissal was proper. We review *de novo* the trial court's dismissal of a postconviction petition without an evidentiary hearing. *People v. Simms*, 192 Ill. 2d 348, 360, 736 N.E.2d 1092, 1105-06 (2000).

¶ 20 The Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/art. 122 (West 2012)) provides a defendant with a collateral means to challenge his or her conviction or sentence for violations of federal or state constitutional rights. *People v. Jones*, 211 Ill. 2d 140, 143, 809 N.E.2d 1233, 1236 (2004). When a case does not involve the death penalty, the adjudication of a defendant's postconviction petition follows a three-stage process. *Jones*, 211 Ill. 2d at 144, 809 N.E.2d at 1236. At the first stage, the trial court must, independently and without considering any argument by the State, decide whether the defendant's petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2012). To survive dismissal at this initial stage, the postconviction petition "need only present the gist of a constitutional claim," which is "a low threshold" that requires the petition to contain only a limited amount of detail. *People v. Gaultney*, 174 Ill. 2d 410, 418, 675 N.E.2d 102, 106 (1996). Legal argument or citation to legal authority is not required. *People v. Brown*, 236 Ill. 2d 175,

184, 923 N.E.2d 748, 754 (2010). However, section 122-2 of the Postconviction Act (725 ILCS 5/122-2 (West 2012)) requires the petition to "have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." In analyzing the petition, courts are to take the allegations of the petition as true, as well as liberally construe them. *Brown*, 236 Ill. 2d at 184, 923 N.E.2d at 754.

¶ 21 Moreover, our supreme court has explained a court may summarily dismiss a *pro se* postconviction petition "as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 11-12, 912 N.E.2d 1204, 1209 (2009). A petition lacks an arguable legal basis when it is based on an indisputably meritless legal theory, such as one the record completely contradicts. *Hodges*, 234 Ill. 2d at 16, 912 N.E.2d at 1212. A petition lacks an arguable factual basis when it is based on a fanciful factual allegation, such as one that is clearly baseless, fantastic, or delusional. *Hodges*, 234 Ill. 2d at 16-17, 912 N.E.2d at 1212.

¶ 22 Additionally, the Postconviction Act's purpose is to allow inquiry into constitutional issues arising from the original conviction and sentence that were not, and could not have been, adjudicated previously on direct appeal. *People v. Harris*, 206 Ill. 2d 1, 12, 794 N.E.2d 314, 323 (2002). The doctrine of *res judicata* bars issues that were raised and decided on direct appeal. *Harris*, 206 Ill. 2d at 12, 794 N.E.2d at 323. The waiver doctrine prohibits the raising of issues that could have been presented on direct appeal but were not. *Harris*, 206 Ill. 2d at 13, 794 N.E.2d at 323. However, Illinois courts have relaxed the doctrines of *res judicata* and waiver in the following three situations: (1) fundamental fairness so requires, (2) the alleged waiver stems from the incompetence of appellate counsel, or (3) the facts relating to the claim do not appear on the face of the original appellate record. *Harris*, 206 Ill. 2d at 13, 794 N.E.2d at

323. Our supreme court has held "trial courts may summarily dismiss postconviction petitions based on both *res judicata* and waiver." *People v. Blair*, 215 Ill. 2d 427, 442, 831 N.E.2d 604, 614 (2005).

¶ 23 On appeal, defendant only raises some of his ineffective-assistance-of-counsel claims. We review ineffective-assistance-of-counsel claims under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Evans*, 186 Ill. 2d 83, 93, 708 N.E.2d 1158, 1163 (1999). To obtain reversal under *Strickland*, a defendant must prove (1) his counsel's performance failed to meet an objective standard of competence and (2) counsel's deficient performance resulted in prejudice to the defendant. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163. To satisfy the deficiency prong of *Strickland*, the defendant must demonstrate counsel made errors so serious and counsel's performance was so deficient that counsel was not functioning as "counsel" guaranteed by the sixth amendment (U.S. Const., amend. VI). *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163. Further, the defendant must overcome the strong presumption the challenged action or inaction could have been the product of sound trial strategy. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163. To satisfy the prejudice prong, the defendant must prove a reasonable probability exists that, but for counsel's unprofessional errors, the proceeding's result would have been different. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163-64. "At the first stage of proceedings under the [Postconviction] Act, a petition alleging ineffective assistance of counsel may not be summarily dismissed if (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." *People v. Petrenko*, 237 Ill. 2d 490, 497, 931 N.E.2d 1198, 1203 (2010).

¶ 24 Defendant first argues his trial counsel was ineffective for stipulating to the existence of 129.7 grams of untested cocaine, which resulted in an increase of $12,970 in

defendant's street-value fine. The State asserts defendant has forfeited this issue by failing to raise it on direct appeal and claims defendant did not plead a basis for not applying forfeiture. However, as defendant notes, he argued in his postconviction petition ineffective assistance of appellate counsel for failing to raise his ineffective-assistance-of-trial-counsel claims, including this one, on direct appeal. Since defendant argued the ineffectiveness of appellate counsel for failing to raise this claim on direct appeal, we will address the merits of this argument under the second reason for relaxing the waiver doctrine.

¶ 25 While defendant describes his trial court's deficient performance as stipulating to the laboratory report, the essence of defendant's argument is the $12,970 increase in his street-value fine was the result of his counsel's error as evidence by the laboratory report. At the first stage of the postconviction process, we are to give liberal construction to *pro se* petitions, reviewing them " 'with a lenient eye, allowing borderline cases to proceed.' " *Hodges*, 234 Ill. 2d at 21, 912 N.E.2d at 1214 (quoting *Williams v. Kullman*, 722 F.2d 1048, 1050 (2d Cir. 1983)).

¶ 26 In this case, the parties stipulated to the admission of the State's exhibit No. 5, an August 2008 laboratory report. The report stated the items submitted where (1) "124.0 grams of white powder" and (2) "129.7 grams of two plastic bags containing white powder." As to findings, the report stated the 124.0 grams was cocaine, and no analysis was performed on the 129.7 grams. At defendant's sentencing hearing, Inspector Mike Willis testified the street value of cocaine at the time of the offense was $100 per gram, and this case involved approximately 254 grams of cocaine. Thus, Inspector Willis opined the street value of the cocaine in this case was $25,400. The trial court ordered defendant to pay a street-value fine of $25,400.

¶ 27 Section 5-9-1.1(a) of the Unified Code of Corrections (730 ILCS 5/5-9-1.1(a) (West 2008)) provides that, when a person has been found guilty of a drug-related offense, a trial

court must impose, in addition to other penalties, a fine not less than the full street value of the controlled substance seized. It also states " '[s]treet value' shall be determined by the court on the basis of testimony of law enforcement personnel and the defendant as to the amount seized and such testimony as may be required by the court as to the current street value of the cannabis or controlled substance seized." 730 ILCS 5/5-9-1.1(a) (West 2008). "Although the amount of evidence necessary to adequately establish the street value of a given drug varies from case to case, the trial court must have a concrete, evidentiary basis for the fine imposed." *People v. Reed*, 376 Ill. App. 3d 121, 129, 875 N.E.2d 167, 175 (2007). Additionally, our supreme court stated, "it is not unreasonable for a trial court to accept the testimony of a narcotics officer as to the street value of drugs seized if the officer has sufficient special knowledge and familiarity with the controlled substance to assist the court in determining the proper fine." *People v. Lusietto*, 131 Ill. 2d 51, 56-57, 544 N.E.2d 785, 787 (1989). The court further noted the opinion of the officer must be reasonable in light of all the evidence. *Lusietto*, 131 Ill. 2d at 57, 544 N.E.2d at 788.

¶ 28 As to the amount of a controlled substance, this court has recognized Illinois case law requires each bag of powder to be subjected to chemical analysis to prove beyond a reasonable doubt each bag contains a controlled substance. *People v. Coleman*, 2012 IL App (4th) 110463, ¶ 69, 981 N.E.2d 1178. Thus, if a case involves several bags of powder, chemically analyzing the contents of only one bag does not prove beyond a reasonable doubt each of the other bags contains a controlled substance. *Coleman*, 2012 IL App (4th) 110463, ¶ 69, 981 N.E.2d 1178.

¶ 29 Here, the laboratory report and the testimony at defendant's trial indicated the 129.7 grams were in two plastic bags separate from the bag containing the powder that tested

positive for cocaine. Thus, it is arguable trial counsel's performance fell below a reasonable standard at defendant's sentencing hearing when counsel did not object to Inspector Willis's testimony based on the lack of testing of the 129.7 grams of powder. Since defendant's street-value fine was increased by $12,970 due to the 129.7 grams of untested powder, it is also arguable defendant was prejudiced by counsel's performance. Accordingly, we find defendant's petition does state the gist of a constitutional claim of ineffective assistance of counsel related to the amount of defendant's street-value fine.

¶ 30 In light of our finding, the entire postconviction petition must be remanded for further proceedings because "summary partial dismissals are not permitted at the first stage of a postconviction proceeding." *Hodges*, 234 Ill. 2d at 22 n.8, 912 N.E.2d at 1215 n.8. Thus, we do not address defendant's other claims of ineffective assistance of counsel. Additionally, our finding is in no way an opinion on the actual merits of the issue or on whether defendant will ultimately prevail on his ineffective-assistance claim. See *Hodges*, 234 Ill. 2d at 22, 912 N.E.2d at 1215.

¶ 31 III. CONCLUSION

¶ 32 For the reasons stated, we reverse the Livingston County circuit court's first-stage dismissal of defendant's postconviction petition and remand for further proceedings.

¶ 33 Reversed and remanded.