

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2015 IL App (4th) 130964-U
NO. 4-13-0964

FILED
August 13, 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.)	McLean County
RANDALL DEWAYNE WHITE,)	No. 10CF953
Defendant-Appellant.)	
)	Honorable
)	Robert L. Freitag,
)	Judge Presiding.

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

ORDER

¶ 1 *Held:* Because no meritorious issue can be raised on appeal, we allow OSAD's motion to withdraw as counsel on appeal and affirm the trial court's second stage dismissal of defendant's postconviction petition.

¶ 2 On September 30, 2013, the trial court granted the State's motion to dismiss defendant's second amended petition for postconviction relief. The trial court appointed the Office of the State Appellate Defender (OSAD) to represent defendant on appeal. OSAD has since filed a motion to withdraw as counsel on appeal "pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987)." This court gave defendant the opportunity to file additional points and authorities. Defendant failed to do so. We grant OSAD's motion and affirm the dismissal of defendant's postconviction petition.

¶ 3 I. BACKGROUND

¶ 4 On October 4, 2010, the State charged defendant by information with unlawful possession of a controlled substance with intent to deliver (less than one gram of a substance containing heroin) (720 ILCS 570/401(d)(i) (West 2008)) and unlawful possession of a controlled substance (less than 15 grams of a substance containing heroin) (720 ILCS 570/402(c) (West 2008)). That same month, a grand jury indicted defendant on both charges.

¶ 5 Defendant's trial was held on June 20, 2011. A jury found defendant not guilty of possession with intent to deliver but guilty of unlawful possession. On August 1, 2011, the trial court sentenced defendant to a four-year extended term of imprisonment.

¶ 6 On August 22, 2011, defendant filed a *pro se* "motion to reconsider sentence" that was more like a posttrial motion. On September 6, 2011, defendant's attorney filed an actual motion to reconsider sentence on his behalf. On January 5, 2012, the trial court denied the motion to reconsider filed on September 6, 2011, by counsel. The court appointed OSAD to represent defendant on appeal. The court also struck as untimely a *pro se* motion for arrest of judgment or for a new trial filed on December 23, 2011.

¶ 7 On September 25, 2013, we granted OSAD's motion to withdraw as counsel on appeal pursuant to *Anders v. California*, 386 U.S. 738 (1967), and affirmed the trial court's judgment. *People v. White*, 2013 IL App (4th) 120096-U, ¶ 44. OSAD argued no colorable argument could be made the State presented insufficient evidence, defendant's counsel was ineffective, the court erred by not considering defendant's *pro se* postsentencing motions, or the court abused its discretion in sentencing defendant. *Id.* ¶ 29.

¶ 8 On March 30, 2012, defendant filed a *pro se* postconviction petition. According to the petition, his indictment was invalid because officer Stephen Brown perjured himself before the grand jury. Defendant also alleged his extended term sentence was not valid because the trial

court looked back more than 10 years. On July 18, 2012, the court appointed the public defender to represent defendant.

¶ 9 On August 6, 2012, the State filed a motion to dismiss defendant's postconviction petition. The State argued defendant failed to make a substantial showing of a constitutional violation.

¶ 10 On February 15, 2013, defendant's appointed counsel filed a motion to withdraw as counsel because no meritorious issue could be raised. On March 21, 2013, defendant filed a response to the State's motion to dismiss his postconviction petition. On April 22, 2013, the trial court allowed defendant's appointed counsel to withdraw.

¶ 11 On May 21, 2013, defendant filed a petition for leave to file a second amended petition for postconviction relief. On June 27, 2013, the trial court allowed defendant leave to file his second amended petition. Defendant's amended petition alleged his rights under the fifth and fourteenth amendments were violated during the grand jury proceedings because the prosecutor knowingly allowed a police officer to give false testimony. According to defendant's petition, probable cause did not exist without the false testimony. Defendant also alleged his trial counsel was ineffective for failing to file motions to quash his arrest and suppress evidence.

¶ 12 On July 25, 2013, the State filed an amended motion to dismiss defendant's postconviction petition. The State argued defendant failed to make a substantial showing of a constitutional violation. According to the State, the defendant's alleged violation of his fifth amendment rights had no arguable basis in law or fact because, regardless of any issue with regard to his indictment, defendant was still found guilty beyond a reasonable doubt without the use of any "perjured" testimony. With regard to the effectiveness of his trial counsel, the State argues counsel's decision to file pretrial motions is considered trial strategy. Further, the State

argued defendant had failed to establish his counsel's conduct was objectively unreasonable or how defendant was prejudiced.

¶ 13 On September 30, 2013, the trial court held a hearing on and granted the State's motion to dismiss defendant's second amended petition. The court appointed OSAD to represent defendant on appeal. On February 9, 2015, OSAD filed a motion to withdraw as counsel on appeal.

¶ 14 II. ANALYSIS

¶ 15 At issue in this appeal is whether the trial court erred in granting the State's motion to dismiss defendant's postconviction petition during the second stage of postconviction proceedings. In determining whether to dismiss a petition, all well-pleaded facts are taken as true unless positively rebutted by the record. *People v. Towns*, 182 Ill. 2d 491, 503, 696 N.E.2d 1128, 1134 (1998). We review the second stage dismissal of a postconviction petition *de novo*. *People v. Pendleton*, 223 Ill. 2d 458, 473, 861 N.E.2d 999, 1008 (2006).

¶ 16 Relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)) is limited to constitutional deprivations that occurred in the original trial court proceedings. *People v. Evans*, 186 Ill. 2d 83, 89, 708 N.E.2d 1158, 1161 (1999). The Act also specifies any claim that was raised or could have been raised on direct appeal cannot be raised in a postconviction petition. *Id.* During the second stage of postconviction proceedings, the court must determine whether the petition and any accompanying documentation establish a substantial showing of a constitutional violation. *People v. Tate*, 2012 IL 112214, ¶ 10, 980 N.E.2d 1100.

¶ 17 Because this petition was not summarily dismissed during the first stage of postconviction proceedings, defendant's petition needed to state more than the gist of a

constitutional claim to survive the State's motion to dismiss. *People v. Coleman*, 183 Ill. 2d 366, 381, 701 N.E.2d 1063, 1072 (1998). Instead, a defendant must make a substantial showing of a constitutional violation. *Id.* A defendant cannot rely on conclusory allegations to establish a substantial showing of a constitutional violation. *Id.* According to our supreme court, "Nonfactual and nonspecific assertions which merely amount to conclusions are not sufficient to require a hearing under the Act." *Id.*

¶ 18 Defendant's appointed counsel on appeal filed a motion to withdraw because any request for review would be without merit. We agree and grant appellate counsel's motion.

¶ 19 In his postconviction petition, defendant raised two issues. First, defendant alleged the State violated his due process rights when it used perjured grand jury testimony to secure an indictment. Second, defendant alleged his trial counsel was ineffective for failing to file pretrial motions to quash his arrest and suppress evidence.

¶ 20 We first address defendant's argument regarding "perjured" grand jury testimony. As the trial court indicated in ruling on this issue, the discrepancy between the grand jury testimony and the trial testimony was not significant. In addition, this court has stated "neither [the United States Supreme Court] nor the Illinois Supreme Court has ever held that due process was violated by the use of perjured testimony before a grand jury." *People v. White*, 180 Ill. App. 3d 781, 784, 536 N.E.2d 481, 482 (1989). In *White*, this court stated, "We need not decide whether the policy of not examining the process of determining probable cause to charge, once guilt has been proved beyond a reasonable doubt, should always prevail." *Id.* at 786, 536 N.E.2d at 484. This court found "other evidence before the grand jury *** was clearly more than sufficient to meet the 'some evidence relative to the charge' standard of [*People v. Rodgers*,

92 Ill. 2d 283, 442 N.E.2d 240 (1982)] which we deem to be sufficient to cure any alleged knowing use of perjury in obtaining the indictment." *Id.*

¶ 21 The same is true in this case. Whether defendant threw or dropped an item, police recovered heroin where the item was dropped. At the hearing on the motion to dismiss, defendant argued:

"The officer that testified in front of the Grand Jury, he was not my arresting officer as well as any arrest report. This officer was the only person who testified, and there was no other evidence that was presented to the Grand Jury.

The whole case that was presented to the Grand Jury was based off the testimony of this officer. His statement was false, it was inaccurate and it was very deceptive."

Defendant took issue with the following exchange from the Grand Jury proceedings:

"[THE STATE]: In fact[,] Randall White[,] when the uniformed officers started approaching him, what did he do?"

[DETECTIVE STEPHEN BROWN]: Turned around again[,] walking away real fast[,] and then they saw him throw something on the ground."

While neither officer present at the encounter stated they saw defendant throw something on the ground, Officer Beoletto's police report noted he saw defendant go behind a tree, lean down as if he was placing something on the ground, and then walk away.

¶ 22 Whether defendant threw or dropped something, the grand jury heard testimony the officers recovered what they believed defendant had thrown or dropped—two individual

packets of heroin packaged for sale. The grand jury also heard defendant had \$480 in cash, which the officers believed to be drug related. This information was sufficient to meet the standard set by our supreme court in *Rodgers*.

¶ 23 Defendant next alleged his trial counsel was ineffective for failing to file a pretrial motion to quash his arrest and suppress evidence. As defendant's appellate counsel states in his motion to withdraw, the failure to file a motion does not demonstrate ineffective assistance if the motion would have been futile. *People v. Givens*, 237 Ill. 2d 311, 331, 934 N.E.2d 470, 482 (2010). Defendant's counsel states a motion to quash arrest and suppress evidence would have been futile based on the facts in this case. Counsel states:

"In the present case, White's allegations lack any basis to file a motion to quash arrest and suppress evidence. It is not a seizure for a police officer to walk toward an individual walking down the street. The police had not seized White at the time he walked behind the tree and placed something on the ground. Only then did Officer Beoletto ask White for his identification. Officer Beoletto had authority to do so because White was on Housing Authority property. [Citation.] It was only then that White was asked not to leave while Officer Beoletto went behind the tree and found the heroin. [Citation.] Looking behind the tree did not affect White's fourth amendment rights because he had no standing to object to that search. *People v. Bookout*, 241 Ill. App. 3d 72, 76, 608 N.E.2d 598, 601 (1993)."

We agree.

¶ 24 OSAD also points out defendant's appointed counsel in the trial court complied with Supreme Court Rule 651(c) when he asked to withdraw from this case. Trial counsel filed a certificate pursuant to Rule 651(c) stating he had consulted with defendant to ascertain defendant's contentions with regard to violations of his constitutional rights, had examined the record of proceedings from trial, and had made any amendments necessary to adequately present defendant's claims. Trial counsel also filed a declaration to stand on defendant's *pro se* pleading. In a letter to defendant, appointed postconviction counsel informed defendant his proposed amendments to the petition were simply the same things defendant had already alleged.

¶ 25 According to OSAD, trial counsel's motion to withdraw was consistent with our supreme court's opinion in *People v. Greer*, 212 Ill. 2d 192, 212, 817 N.E.2d 511, 523 (2004) ("an attorney moving to withdraw should make some effort to explain *why* defendant's claims are frivolous or patently without merit") (Emphasis in original.) We agree.

¶ 26 III. CONCLUSION

¶ 27 For the reasons stated, we grant OSAD's motion to withdraw and affirm the trial court's dismissal of defendant's postconviction petition.

¶ 28 Affirmed.