2015 IL App (4th) 140185-U

NO. 4-14-0185

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
May 6, 2015
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Woodford County
THOMAS F. SIMPSON,	)	No. 09CF6
Defendant-Appellant.	)	
	)	Honorable
	)	John B. Huschen,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Knecht and Turner concurred in the judgment.

ORDER

¶ 1 *Held*: We grant the office of the State Appellate Defender's motion to withdraw and affirm the trial court's denial of defendant's postconviction petition where defendant failed to prove a substantial denial of his constitutional rights and no meritorious issues can be raised on appeal.

¶ 2 This case comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as appellate counsel on the ground that no meritorious issues can be raised in this case. For the reasons that follow, we grant OSAD's motion to withdraw and affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 In January 2009, in separate cases, the State charged defendant, Thomas F. Simpson, with two counts of violation of an order of protection, one a Class A misdemeanor (Woodford County case No. 09-CM-19), and the other a Class 4 felony based upon his previous

conviction of aggravated domestic battery (Woodford County case No. 09-CF-6) (see 720 ILCS 5/12-30 (West 2008)). In February 2009, while represented by counsel, defendant pleaded guilty as part of an open plea agreement to the felony charge in exchange for the State's dismissal of the misdemeanor charge. In March 2009, the trial court sentenced defendant to a six-year extended prison term because defendant had previously been convicted of another Class 4 felony within 10 years.

¶ 5 After sentencing, in March 2009, defendant filed a *pro se* motion to reconsider his sentence. The trial court reappointed counsel and scheduled an April 2009 hearing on defendant's motion. On April 16, 2009, counsel filed a Rule 604(d) certificate, stating he had (1) consulted with defendant to ascertain his contentions of error in the sentence or guilty plea, (2) examined the court file and report of proceedings, and (3) made any necessary amendments to the motion to ensure the adequate presentation of any defects in those proceedings.

¶ 6 At the April 27, 2009, hearing, counsel stated as follows:

> "Well, Your Honor, the issues that I would entertain here would be I am looking at the defendant's handwritten motions. And number 6 I would argue as well as number 13. And I'm not sure about number 14. The rest of the issues that are brought up I have researched, and I do not find them of any legal relevance."

The trial court asked counsel to proceed with his arguments on the particular claims. The following exchange occurred:

> "THE COURT: Okay. Relative to 6, Mr. Pioletti [(defense attorney)], you're referring to setting of bond?
>
> MR. PIOLETTI: Right.

THE COURT: Okay.

MR. PIOLETTI: I don't think that that would have a bearing now.

THE COURT: Okay. I just wanted to make sure.

MR. PIOLETTI: Yeah.

THE COURT: What did you say 6, 13, and what?

MR. PIOLETTI: 13 and a possible 14. I haven't really researched 14. The 14, the risk assessment, I could say that that was never produced to the defendant or to his attorney.

THE COURT: Okay. Mr. Dluski [(assistant State's Attorney)]?"

The prosecutor presented his argument on defendant's entire motion and claims numbered 6, 13, and 14, in particular. After the State's argument, the court asked defense counsel if he had anything further. Counsel answered, "No." The court denied defendant's motion.

¶ 7 Defendant filed a direct appeal, challenging his sentence only. This court affirmed defendant's sentence, despite his claim of excessiveness, but modified the sentencing judgment to include additional sentencing credit to which defendant was entitled. See *People v. Simpson*, No. 4-09-0323 (Oct. 25, 2010) (unpublished order under Supreme Court Rule 23).

¶ 8 In November 2009, while his direct appeal was pending, defendant filed a *pro se* postconviction petition, alleging, *inter alia*, his trial counsel rendered ineffective assistance when he filed his Rule 604(d) certificate without first consulting with defendant. The trial court struck defendant's petition for lack of jurisdiction due to the pending appeal. This court reversed and

remanded for second-stage postconviction proceedings. See *People v. Simpson*, No. 4-10-0054 (June 7, 2010) (unpublished order under Supreme Court Rule 23).

¶ 9 On remand, the trial court appointed postconviction counsel, but defendant chose to proceed *pro se*. On February 9, 2011, defendant filed an amended *pro se* postconviction petition, adding a claim that his appellate counsel rendered ineffective assistance for failing to raise the Rule 604(d) challenge on direct appeal. Upon the State's motion, the trial court dismissed defendant's petition for failing to make a substantial showing of a constitutional deprivation. Defendant appealed. This court reversed the trial court's dismissal and remanded for a third-stage evidentiary hearing. *People v. Simpson*, 2013 IL App (4th) 110552-U, ¶¶ 19-20.

¶ 10 Defendant continued to represent himself. On May 16, 2013, he filed a *pro se* petition for *habeas corpus*, claiming, *inter alia*, he was entitled to immediate release from prison because his rights to the effective assistance of counsel and due process were violated. The State filed a motion to dismiss. On August 7, 2013, defendant filed a motion "to recharacterize petition for order of *habeas corpus* as supplemental amendment to petition for post-conviction relief." The same day, defendant filed a motion for leave to file a supplemental amendment to his petition for postconviction relief. On August 12, 2013, defendant filed another, similar motion for leave to file a supplemental amendment to his petition for postconviction relief. He alleged his trial counsel was ineffective for failing to (1) argue he had been denied counsel at a critical stage of the proceedings at his first appearance hearing in January 2009; (2) file a petition for *habeas corpus* relief because his second arrest (his arrest on the felony charge) and imposition of bond were unconstitutional; and (3) object to the State's dismissal of the misdemeanor charge because his guilty plea on the felony charge should have resulted in an automatic acquittal of the lesser charge.

¶ 11 On November 15, 2013, the trial court conducted a hearing on the pending motions. First, the parties stipulated that, if called to testify, Assistant State's Attorney Peter Dluski, would state as follows: During the holiday weekend of January 18, 2009, he reviewed the probable cause statement of defendant's violation-of-an-order-of-protection charge. Dluski was not aware of defendant's prior convictions, so he authorized the charge be filed as a misdemeanor and asked for $3,000 bond. The next business day, Tuesday, January 20, 2009, Dluski became aware of defendant's criminal record. Dluski then filed a felony charge for the same offense.

¶ 12 Defendant called Annette Wilkey, a court reporter, who testified that an uncertified transcript is not considered unreliable. She certified defendant's February 13, 2009, guilty-plea hearing on May 13, 2009, but she did not recall when it was transcribed.

¶ 13 Michael Vonnahmen, defendant's appellate counsel, testified he raised only two issues on direct appeal: (1) the excessiveness of defendant's sentence; and (2) defendant's entitlement to three additional days of sentencing credit. He did not raise any other issues because, in his opinion, no other valid issue existed.

¶ 14 Don B. Pioletti, Jr., defendant's trial counsel, testified he believed he had, in fact, complied with Illinois Supreme Court Rule 640(d) (eff. July 1, 2006) when he filed his certificate in defendant's case. He said he researched the allegations in defendant's *pro se* petition and did not believe they had merit. He said he spoke with defendant after the sentencing hearing. He could not specifically recall if he had read the transcript of the guilty-plea hearing, but he was certain he had read the transcript of the sentencing hearing. He said he "probably" did because he indicated he had done so on his certificate. Counsel stated it was "customary" to

have a misdemeanor charge dismissed during plea negotiations, and the misdemeanor charge would not have resulted in an automatic acquittal upon a plea of guilty to the felony charge.

¶ 15 After the presentation of witnesses, defendant argued his claims, disputing some of the witnesses' testimony. The trial court denied defendant's petitions for postconviction and *habeas corpus* relief, finding defendant failed to sufficiently prove the only "close argument" presented. The court found defendant had failed to demonstrate trial counsel had not reviewed the transcripts of the guilty-plea hearing and therefore, he could not prove counsel had violated Rule 604(d). The court noted that, even if a Rule 604(d) violation had been shown, defendant was unable to prove how the result would have been different.

¶ 16 Defendant filed a timely *pro se* motion to reconsider, arguing he was entitled to a new hearing because (1) his legs were shackled during the hearing without determining necessity, (2) he was not allowed to approach the witnesses, (3) the prosecutor insisted he inspect each document before it was tendered to a witness, (4) he was not prepared to question appellate counsel, and (5) his mother saw the prosecutor talking to Dluski without defendant present. After a February 26, 2014, hearing, the trial court denied defendant's motion.

¶ 17 This appeal followed. The trial court appointed OSAD to represent defendant on appeal. In July 2014, OSAD filed a motion to withdraw as appellate counsel, including in its motion a brief in conformity with the requirements of *Pennsylvania v. Finley*, 481 U.S. 551 (1987). The record shows service on defendant. On its own motion, this court granted defendant leave to file additional points and authorities, which he did on September 5, 2014. The State has responded.

¶ 18 II. ANALYSIS

¶ 19 On appeal, OSAD contends no meritorious issues can be raised for review. Specifically, OSAD contends no colorable argument can be made that (1) the trial court erred in denying defendant's postconviction claim that trial counsel's failure to comply with Rule 604(d) denied him his right to effective assistance of counsel, (2) defendant sufficiently proved appellate counsel rendered ineffective assistance of counsel, (3) defendant was entitled to a new third-stage evidentiary hearing, or (4) the court erred in denying defendant *habeas corpus* relief. We agree.

¶ 20 A. Rule 604(d) Compliance

¶ 21 In defendant's prior appeal, this court remanded for a third-stage evidentiary hearing for the trial court to determine whether trial counsel had consulted with defendant and reviewed the relevant transcripts as represented in his Rule 604(d) certificate. The court was to evaluate the evidence in the context of the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), to determine whether counsel rendered ineffective assistance. See *Simpson*, 2013 IL App (4th) 110552-U, ¶¶ 17, 19.

¶ 22 At the evidentiary hearing, the trial court determined defendant had not met his burden of establishing a Rule 604(d) violation. The court further found, even if defendant had met his burden, he had not demonstrated how the result of the proceedings would have been different. The trial court's decision at a third-stage evidentiary hearing will be not reversed unless it was manifestly erroneous. *People v. Coleman*, 183 Ill. 2d 366, 384 (1998).

¶ 23 Trial counsel testified at the evidentiary hearing that he had consulted with defendant after the sentencing hearing regarding defendant's sentence. He also testified he likely reviewed the plea-hearing transcript, even though he could not recall specifically doing so. Counsel indicated he usually reviewed the transcript when appointed under similar

circumstances, and since he had indicated he had done so in his Rule 604(d) certificate, he said he "probably" had reviewed the transcript. Although defendant disputes counsel's testimony, it was the trial court's responsibility to determine whether counsel's testimony was credible. *People v. Steidl*, 142 Ill. 2d 204, 226 (1991) (trial court is responsible for determining the credibility of witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn from the evidence).

¶ 24 Defendant argues that, because the transcript in question was not certified until after trial counsel had filed his Rule 604(d) certificate, it was impossible for counsel to review the transcript as he said he had done in the certificate. However, the court reporter testified at the postconviction hearing that the transcript was not necessarily certified upon transcription, and a transcription that was not certified was not necessarily unreliable. Thus, it was possible counsel reviewed the uncertified transcript and consulted with defendant as represented in his certificate. OSAD responds that no colorable argument can be made that counsel violated Rule 604(d) certification requirements. We agree with OSAD.

¶ 25 Likewise, we agree with OSAD that, even if defendant had sufficiently proved a Rule 604(d) violation, he failed to demonstrate prejudice as required under an ineffective-assistance-of-counsel claim. See *People v. Wilk*, 124 Ill. 2d 93, 108 (1988) (two-pronged *Strickland* test applies at a third-stage postconviction hearing addressing an alleged Rule 604(d) violation). Defendant claims his trial counsel's violation of Rule 604(d) prevented counsel from raising two meritorious issues: (1) his right to counsel at his first appearance in January 2009, and (2) the enhancement of the charge from a misdemeanor to a felony in violation of the *ex post facto* law. Not only were these claims waived when defendant entered his guilty plea (*People v. Owens*, 131 Ill. App. 3d 381, 383 (1985)), but OSAD is correct that these claims would not have

provided an arguable basis to withdraw his plea, as both were without merit. See *People v. Davis*, 145 Ill. 2d 240, 244 (1991) (provides grounds for a motion to withdraw guilty plea); see also *Gerstein v. Pugh*, 420 U.S. 103, 122 (1975) (first appearance is not a critical stage that would require appointed counsel); *People v. Dunigan*, 165 Ill. 2d 235, 241-42 (1995) (use of prior conviction to enhance misdemeanor to felony did not violate *ex post facto* provisions).

¶ 26 The trial court's ruling on the Rule 604(d) issue was not manifestly erroneous. Thus, we agree with OSAD's assessment and find no meritorious issues exist for purposes of appeal with regard to defendant's claimed violation of Rule 604(d).

¶ 27 B. Ineffective Assistance of Appellate Counsel

¶ 28 This court also remanded for an evidentiary hearing on defendant's claim that his appellate counsel was ineffective for failing to raise the Rule 604(d) issue on direct appeal. *Simpson*, 2013 IL App (4th) 110552-U, ¶ 20.

¶ 29 As explained in the analysis above, we find defendant failed to demonstrate trial counsel violated Rule 604(d) certification requirements. As such, appellate counsel could not have rendered ineffective assistance for failing to raise a nonmeritorious claim. *People v. Simms*, 192 Ill. 2d 348, 362 (2000).

¶ 30 C. Remand for a New Third-Stage Evidentiary Hearing

¶ 31 Defendant's claim that he is entitled to a rehearing at the third stage of the postconviction proceedings is also without merit and cannot support any cognizable claim on appeal. Defendant was able to present evidence and question witnesses in accordance with his due-process rights afforded at the postconviction stage. Whether to restrain a defendant at a postconviction hearing is not given the same scrutiny as it is during trial proceedings, where the

defendant's guilt or innocence is determined. *People v. Kelley*, 2013 IL App (4th) 110874, ¶ 25. Regardless, defendant did not request his leg shackles be removed during the hearing.

¶ 32 The trial court conducted the hearing in accordance with statutory procedures. The court did not prevent defendant from questioning witnesses or presenting those witnesses with documents. The court allowed defendant to tender documents to the witnesses through the bailiff. Finally, defendant cannot demonstrate any impropriety from noting that the prosecutor spoke with Dluski outside defendant's presence, as counsel is authorized to speak with his own witness to ascertain the nature of the witnesses' anticipated testimony. Nevertheless, defendant stipulated to the nature of Dluski's testimony at the hearing, forfeiting any objection thereto. Again, we agree with OSAD that none of these allegations support a claim that defendant suffered a substantial denial of his constitutional rights or, in particular, the denial of a fair hearing.

¶ 33 D. Petition for *Habeas Corpus Relief*

¶ 34 It is a well-settled principle of law that a defendant is entitled to *habeas corpus* relief *only* if he was incarcerated under a judgment of a court which lacked personal or subject-matter jurisdiction or where something has occurred since his conviction that entitles him to release. *Beacham v. Walker*, 231 Ill. 2d 51, 58 (2008). Defendant contends he is entitled to relief under the same grounds as discussed above, namely: (1) he was deprived of his right to counsel at his first appearance in January 2009, and (2) his rights were violated upon the enhancement of the charge from a misdemeanor to a felony as a violation of the *ex post facto* law. We analyzed both issues above and found no merit to either.

¶ 35 In sum, OSAD contends no colorable argument can be made as to any of defendant's potential claims on appeal. We agree.

¶ 36 III. CONCLUSION

¶ 37 For the reasons stated, we grant OSAD's motion to withdraw as appellate counsel and affirm the trial court's judgment. As part of our judgment, we award the State $50 against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2012).

¶ 38 Affirmed.