2015 IL App (4th) 140468-U

NOS. 4-14-0468, 4-14-0947 cons.

FILED
October 22, 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.	)	Macon County
WILLIE R. ROBINSON,	)	No. 10CF701
Defendant-Appellant.	)	
	)	Honorable
	)	Timothy J. Steadman,
	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: Defendant filed two petitions, which the trial court was correct to dismiss: the postconviction petition because it was frivolous and the petition for relief from judgment because it was untimely.

¶ 2 Defendant, Willie R. Robinson, who is serving a sentence of 25 years' imprisonment for burglary (720 ILCS 5/19-1(a) (West 2010)), petitioned the trial court for postconviction relief (see 725 ILCS 5/122-1(a)(1) (West 2014)) and for relief from the judgment (735 ILCS 5/2-1401 (West 2014)). The court summarily dismissed the petition for postconviction relief and granted a motion by the State to dismiss the petition for relief from the judgment. Defendant appeals both dismissal orders. We have consolidated the two appeals.

¶ 3 The office of the State Appellate Defender (appellate counsel) has moved for permission to withdraw from representing defendant in the two appeals, because appellate counsel deems them to be frivolous. After considering defendant's written responses, we agree

with appellate counsel's assessment of the merits of these appeals. Therefore, we grant the motions to withdraw, and we affirm the dismissal orders.

¶ 4 I. BACKGROUND

¶ 5 The jury trial occurred in September 2010. The evidence tended to show the following.

¶ 6 In March 2010, James Wright owned a house in Decatur. The house was unoccupied. It used to belong to his parents, who were deceased. Many of their belongings were still inside the house, including furniture and three televisions.

¶ 7 Wright lived in Kansas City, and his aunt, Eva Sain, had promised him she would check on the house periodically. For that purpose, he gave her the keys to the house in October 2009. Sain drove by the house a few times a week and went inside at least twice a week, always entering through the back door.

¶ 8 The house had a front door and a back door, both of which were fronted by a wrought-iron security door. The security doors could be opened from the inside and outside only with a key.

¶ 9 Also, the house had an enclosed back porch, which one entered through a screen door. Blinds hung down over the inside of the screen door so that anyone entering through the screen door would have to push aside the blinds to go through the doorway. A sliding glass door opened from the back porch to a bedroom. On the same wall as the sliding glass door, there was a sash window. This window, which was above the kitchen sink, looked out on the back porch. All the doors normally were kept locked, and a stick inserted in the track of the sliding glass door made it impossible to open.

¶ 10 On March 13, 2010, Sain went by the house and saw the back door was standing open, inside the locked security door. She telephoned the police, and she also telephoned her husband, asking him to bring the house keys.

¶ 11 Police officers entered the house around 5 p.m., after being given the keys. They found that the front door, both security doors, and the sliding glass door were all locked. But the screen door to the back porch was slightly ajar. It did not appear to have been forced open. Sain did not recall unlocking the screen door, but she thought she might have done so when she last went into the house, two or three days earlier.

¶ 12 A 32-inch television on the back porch was lying on its side. The television would have fit through the screen door. Shards of glass were on the floor of the back porch and in the kitchen sink because someone had broken in through the sash window. A coffee table was knocked over in the living room. Both bedrooms looked as if they had been ransacked. Someone had pulled out the drawers of the dressers and scattered their contents. Things had been tossed out of the closet. According to Sain, the house was tidy the last time she was inside. Nothing appeared to be missing from the house.

¶ 13 Police officers found a bloodstain on a cushion that had been knocked off a chair on the back porch. They also found a smear of blood on the blinds that hung inside the screen door. Sain testified the blood was not there the last time she was in the house.

¶ 14 The police had the bloodstain on the blinds scientifically analyzed, and as it turned out, the deoxyribonucleic acid (DNA) had come from defendant.

¶ 15 Wright never gave defendant permission to enter the house.

¶ 16 II. ANALYSIS

¶ 17 A. Authority for the Motions To Withdraw

¶ 18 Appellate counsel says its motions to withdraw are "[p]ursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and *People v. Lee*, 251 Ill. App. 3d 63 (1993)." We are not sure that is correct. Neither *Finley* nor *Lee* prescribes a standard or procedure for withdrawing from representing a defendant on appeal in a collateral proceeding, such that one could say a motion to withdraw is *pursuant to* those cases.

¶ 19 *Finley* merely holds that the "prophylactic" procedures in *Anders v. California*, 386 U.S. 738 (1967), whereby an attorney withdraws from representing a defendant on direct appeal in a criminal case, are inapplicable to postconviction proceedings, because while there is a constitutional right to counsel in "the first appeal of right," there is no constitutional right to counsel in postconviction proceedings. *Finley*, 481 U.S. at 554-55. The Supreme Court never ventured to suggest what procedures should be used in lieu of those in *Anders*; that was the states' business.

¶ 20 As for *Lee*, it appears that the appellate counsel in that case used the procedures in *Anders* to request permission to withdraw from representing the defendant in a postconviction proceeding (see *Lee*, 251 Ill. App. 3d at 65), but the appellate court in *Lee* expressed no opinion on the necessity or advisability of those procedures.

¶ 21 Maybe it would be more accurate to say that appellate counsel's motions to withdraw are pursuant to Illinois Supreme Court Rule 375(b) (eff. Feb. 1, 1994), which prohibits frivolous appeals, and Illinois Supreme Court Rule 361(a) (eff. Jan. 1, 2015), which provides that motions "shall state the relief sought and the grounds therefor," including, as necessary, an "[a]rgument."

¶ 22 B. Claims in the Postconviction Petition

¶ 23 1. *The Lack of Probable Cause*

¶ 24 Defendant's first claim in his postconviction petition is that the trial court erred in the preliminary hearing by finding probable cause. See Ill. Const., art. I, § 7.

¶ 25 Setting aside the question of whether this claim has any merit and setting aside the further question of whether this claim is moot, given the jury's finding of guilt (see *People v. Boyle*, 161 Ill. App. 3d 1054, 1065 (1987)), it would have been possible to make this claim on direct appeal. Reference to matters outside the record would have been unnecessary and, indeed, superfluous. The testimony in the preliminary hearing either established probable cause or did not do so. All defendant would have had to do is refer to the transcript of the preliminary hearing. He could have done that on direct appeal. There was no reason to wait until now.

¶ 26 A postconviction proceeding is not an addendum to the direct appeal. *People v. Kokoraleis*, 159 Ill. 2d 325, 328 (1994). *Res judicata* bars the reconsideration of issues already decided on direct appeal, and issues that could have been raised on direct appeal, but were not raised, are forfeited. *People v. Pitsonbarger*, 205 Ill. 2d 444, 455-56 (2002). The issue of probable cause is forfeited.

¶ 27 2. *The Insufficiency of the Evidence*

¶ 28 Defendant's second claim is that the State failed to prove him guilty beyond a reasonable doubt. According to him, the State's entire case consisted of the unreasonable "presumption" that simply because his blood was found on the blinds, which faced outdoors, he had unlawfully entered the house with the intent to commit a theft. He quotes *People v. Housby*, 84 Ill. 2d 415, 421 (1981): "[W]here the permissive inference stands unsupported by corroborating circumstances, the leap from the proved fact to the presumed element must satisfy the higher standard—proof beyond a reasonable doubt—for there is nothing else on which to rest the fact finder's verdict of guilt." The "proved fact" was that his DNA was on the blinds. The

"presumed elements" were that he unlawfully entered the house and did so with the intent to commit a theft. He reasons that because there is only the "proved fact," his DNA, and no corroborating evidence that he unlawfully entered the house with the intent to commit a theft, his conviction fails the test in *Housby*.

¶ 29 This argument suffers from two fatal weaknesses. First, defendant is foreclosed from relitigating the element of intent. On direct appeal, we found sufficient evidence that he intended to commit a theft when entering the house. *People v. Robinson*, 2013 IL App (4th) 120263-U, ¶ 1. That decision is now *res judicata*. See *People v. Beaman*, 229 Ill. 2d 56, 71 (2008).

¶ 30 Second, *Housby* is irrelevant unless the trial court instructed the jury on a particular inference it might draw. *People v. Richardson*, 104 Ill. 2d 8, 12 (1984). The court did not do so in this case. The court did not instruct the jury that it might infer, from defendant's blood on the blinds, that he had unlawfully entered the house. *Cf. Housby*, 84 Ill. 2d 415, 419 (1981) (in which the trial court instructed the jury: " 'If you find that the defendant had exclusive possession of recently stolen property, and there was no reasonable explanation of his possession, you may infer that the defendant obtained possession of the property by burglary.' "). Instead, the court instructed the jury on the elements of burglary and further instructed the jury that each element had to be proved beyond a reasonable doubt. Under the instructions, the jury was to consider all the evidence and decide, entirely on its own, whether the State had proved the elements of the crime beyond a reasonable doubt. Due process was satisfied. See *Richardson*, 104 Ill. 2d at 12.

¶ 31 3. *Impermissible Comments by the Prosecutor During Closing Arguments*

¶ 32 Defendant's third claim is that the prosecutor "made improper and false statements during closing arguments."

¶ 33 This claim is forfeited because it could have been made on direct appeal. See *People v. Petrenko*, 237 Ill. 2d 490, 499 (2010).

¶ 34 4. *Speedy Trial*

¶ 35 Defendant's fourth claim is that he was denied his right to a speedy trial.

¶ 36 This claim is forfeited because it could have been made on direct appeal. See *id.*

¶ 37 5. *Prosecutorial Vindictiveness*

¶ 38 Defendant's fifth claim is that the prosecutor punished him for declining to enter into a negotiated plea agreement. He alleges the following facts in support of that claim.

¶ 39 In a separate case, People v. Robinson, Macon County case No. 10-CF-1209, the State charged him with theft of a registration sticker. He had been driving a car, and the registration sticker did not match the license plate. According to defendant, if the State had done a conscientious investigation, it would have discovered that someone else owned the car. By defendant's reasoning, it was unlikely he would have stolen a registration sticker for use on someone else's car. Even so, the State charged him as a Class X offender for theft of a registration sticker (he had prior convictions), and then the prosecutor tried to use the theft case to pressure him into accepting a plea offer in the present case, the burglary case. He declined the plea offer, and the prosecutor allegedly responded, " 'Okay, then I'm going to shoot for the moon.' "

¶ 40 Defendant has failed to substantiate these factual allegations with a separate affidavit or, alternatively, to explain the lack of such an affidavit. See 725 ILCS 5/122-2 (West 2014). It is true he has verified his petition, but a verification pursuant to section 122-1(b) of the

Post-Conviction Hearing Act (725 ILCS 5/122-1(b) (West 2014)) cannot substitute for the "affidavits, records, or other evidence" that section 122-2 (725 ILCS 5/122-2 (West 2014)) requires. See *People v. Collins*, 202 Ill. 2d 59, 66 (2002). The lack of supporting materials pursuant to section 122-2 alone justifies the summary dismissal of a postconviction petition. *Id.*

¶ 41 Another problem with this claim is that if we understand "shooting for the moon" as recommending the maximum punishment, the prosecutor ultimately did not shoot for the moon. Because of defendant's previous convictions, he had to be sentenced as a Class X offender (see 730 ILCS 5/5-4.5-95(b) (West 2010)), and the Class X range was imprisonment for no less than 6 years and no more than 30 years (730 ILCS 5/5-4.5-25(a) (West 2010)). The prosecutor recommended 25 years' imprisonment, not 30 years' imprisonment.

¶ 42 6. *Ineffectiveness of Trial Counsel*

¶ 43 Defendant claims that, in three ways, his trial counsel rendered ineffective assistance: (1) he failed to present alibi evidence in the jury trial, (2) he had a conflict of interest, and (3) he failed to present mitigating evidence in the sentencing hearing. We will consider each of those points in turn, asking whether it is arguable that defense counsel's performance fell below an objective standard of reasonableness and, if so, whether it is arguable that defendant was prejudiced (see *People v. Tate*, 2012 IL 112214, ¶ 19).

¶ 44 a. Failure To Present Alibi Evidence

¶ 45 Defendant represents in his petition that, at the time of the break-in, he was a full-time student and a caregiver to his elderly mother. He accuses his trial counsel of rendering ineffective assistance by failing to present those facts to the jury as an alibi.

¶ 46 In the absence of a corroborating affidavit pursuant to section 122-2 (725 ILCS 5/122-2 (West 2014)), we lack statutory authority to consider defendant's representations that he was a full-time student and a caregiver. See *Collins*, 202 Ill. 2d at 66.

¶ 47 Apart from the lack of corroboration, we observe that the value of this so-called alibi would have been nil, considering that defendant had enough leisure to leave his DNA on the blinds of the back porch. One of the elements of ineffective assistance is objectively unreasonable performance (*People v. Patterson*, 2014 IL 115102, ¶ 81), and it would have been unwise to suggest to the jury that defendant's commitments as a student and caregiver had left him no opportunity to burglarize the house. Obviously, he had been at the house. His blood was on the blinds. It is not arguable that defense counsel fell below the standard of objective reasonableness by discarding this so-called alibi.

¶ 48 b. Conflict of Interest

¶ 49 On July 15, 2010, the State moved for a continuance on the ground that its expert from the forensic laboratory was on maternity leave. Defense counsel responded: "[T]his puts me in a very difficult situation because I have a working relationship with [the prosecutor] and I don't want to ruin that by being a jerk here about somebody we've agreed with." Nevertheless, defense counsel objected to the proposed continuance, and the trial court granted the continuance over his objection.

¶ 50 Defendant argues that because defense counsel stated he had "a working relationship with [the prosecutor]," defense counsel was in a conflict of interest. Defendant could have made this claim on direct appeal, but he did not do so. Therefore, the claim is forfeited. See *Petrenko*, 237 Ill. 2d at 499.

¶ 51 c. Not Presenting Mitigating Evidence in the Sentencing Hearing

¶ 52 Defendant alleges that defense counsel committed ineffective assistance also by failing to present any mitigation evidence in the sentencing hearing. According to defendant, "defense counsel could at the very least [have] introduced the 2010 record of [defendant], at the time of his arrest, being a full time student and though it was his mother, [defendant's] demonstration of compassion as the primary caregiver, and the nonviolence of the crime that was committed."

¶ 53 It is unclear what "2010 record" defendant means in this context, but, in any event, if defendant had chosen to attend his own sentencing hearing, defense counsel could have called him to testify he was a full-time student and the primary caregiver for his mother. But defendant absented himself from the sentencing hearing.

¶ 54 It could not have been easy arguing for a light sentence when the client did not even bother to show up for the sentencing hearing. Nevertheless, defense counsel worked with what he had. He pointed out that no property had been taken. Obviously, defendant had inflicted no violence against anyone, or else he would have been facing a more serious charge. It is not arguable that defense counsel fell below an objective standard of reasonableness in the sentencing hearing. See *Tate*, 2012 IL 112214, ¶ 19.

¶ 55 7. *Ineffectiveness of Appellate Counsel*

¶ 56 Defendant claims that, on direct appeal, his appellate counsel rendered ineffective assistance by challenging the sufficiency of the evidence only as to the element of an intent to commit a theft and not as to the other element, an unlawful entry. See *People v. Cabrera*, 116 Ill. 2d 474, 492 (1987) ("To commit burglary there must be an unlawful entry into a building with the intent to commit a felony or theft."). (Appellate counsel for the Fourth District

represented him on direct appeal, whereas appellate counsel for the First District now represents him.)

¶ 57 Appellate counsel decided not to contend, on direct appeal, that there was insufficient evidence of an unlawful entry by defendant. Because such a contention would have been irreconcilable with *People v. Collins*, 106 Ill. 2d 237 (1985), it is not arguable that appellate counsel thereby fell below a standard of objective reasonableness.

¶ 58 According to *Collins*, when a defendant challenges the sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Internal quotation marks omitted and emphasis in original.) *Collins*, 106 Ill. 2d at 261. Looking at the evidence in the light most favorable to the prosecution means drawing all reasonable inferences in favor of the prosecution. *People v. Baskerville*, 2012 IL 111056, ¶ 31. It is a reasonable inference that an intruder entered the house by breaking the kitchen window. It is undeniable that the intruder lacked permission to enter the house. When the blood on the blinds is considered in conjunction with the broken glass of the kitchen window, it is a reasonable inference that the intruder cut himself on the glass. Defendant does not dispute that the blood is his.

¶ 59 It is not arguable that appellate counsel was objectively unreasonable to foregoing a frivolous challenge to the element of an unlawful entry. See *People v. Stephens*, 2012 IL App (1st) 110296, ¶ 109 ("Appellate counsel is not required to raise every conceivable issue on appeal, and it is not incompetence for counsel to refrain from raising issues that counsel believes are without merit. [Citation.] Accordingly, unless the underlying issue has merit, there is no prejudice from appellate counsel's failure to raise an issue on appeal.").

¶ 60 C. The Petition for Relief From Judgment

¶ 61 Citing section 2-1401(f) of the Code of Civil Procedure (735 ILCS 5/2-1401(f) (West 2014)), defendant petitioned for relief from a void judgment on the ground that his defense counsel was in a conflict of interest, as evidenced by his expressed desire to maintain "a good working relationship" with the prosecutor. Later, he amended his petition to add an allegation that his right to a speedy trial had been violated. The State moved to dismiss the petition on the ground that defendant had filed it more than two years after the entry of the judgment. See 735 ILCS 5/2-1401(c) (West 2014). The trial court granted the motion for dismissal.

¶ 62 The trial court was correct to dismiss this petition as well. Because of the lateness of this petition, we do not even reach its merits. The court imposed the sentence on November 4, 2010. This was the final judgment. See 730 ILCS 5/5-1-12 (West 2014); *People v. Lopez*, 129 Ill. App. 3d 488, 491 (1984). More than two years later, on June 2, 2014, defendant filed his petition for relief from judgment. The petition is untimely under section 2-1401(c) (735 ILCS 5/2-1401(c) (West 2014)).

¶ 63 We realize that defendant cited section 2-1401(f) (735 ILCS 5/2-1401(f) (West 2014)), which provides: " Nothing contained in this Section affects any existing right to relief from a void order or judgment ***." We are aware of no case holding, however, that either a conflict of interest or a speedy-trial violation makes the judgment in a criminal case void. See *People v. Pearson*, 88 Ill. 2d 210, 216 (1981) ("[T]he right conferred by the [speedy-trial] statute is not absolute in the sense that the mere passage of time ousts the court of jurisdiction to try the accused ***.").

¶ 64 III. CONCLUSION

¶ 65 For the foregoing reasons, we affirm the trial court's judgment in the two cases, and we grant appellate counsel's motions to withdraw. We award the State $50 for costs.

¶ 66 Affirmed.