2015 IL App (4th) 140904-U

NO. 4-14-0904

FILED
December 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.	)	Vermilion County
RONALD M. VANPELT,	)	No. 10CF107
Defendant-Appellant.	)	
	)	Honorable
	)	Craig H. DeArmond,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Turner and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in summarily dismissing defendant's *pro se* postconviction petition.

¶ 2 On August 25, 2014, defendant, Ronald M. VanPelt, filed a *pro se* postconviction petition, alleging numerous violations of his constitutional rights. On September 29, 2014, the trial court summarily dismissed defendant's petition. On January 20, 2015, this court allowed defendant's motion to discharge the office of the State Appellate Defender (OSAD). Defendant now proceeds *pro se*, arguing his postconviction petition should not have been summarily dismissed. We affirm.

¶ 3 I. BACKGROUND

¶ 4 We recently addressed the factual background of defendant's criminal case in *People v. VanPelt*, 2013 IL App (4th) 110600-U (unpublished order under Supreme Court Rule

23). Thus, we will refer to those facts only as necessary in the discussion of the issues raised in petitioner's postconviction petition.

¶ 5 At the May 2011 jury trial, Anthony Forman testified he was sitting in his parked car in Danville, Illinois, late in the evening on March 1, 2010, when he noticed a van "circling around" the area. He knew the van belonged to Shannon Whorrall. As Forman drove a circuitous route, the van followed him. Forman observed Whorrall was driving the van and had a passenger. Forman parked on the street and the van pulled up alongside of his vehicle. Forman got out of his vehicle and asked Whorrall why she was following him. Whorrall's passenger leaned across the driver's seat of the van and shot Forman in the chest. Forman had seen the man who shot him around Danville for years and knew his street name was "Mo-Mo." Forman identified defendant as the gunman from a police photograph array. He also identified defendant in court as the man who shot him.

¶ 6 Whorrall testified she had known Forman since childhood. Whorrall had known defendant for three years. They were in a relationship, defendant lived with her, and they had a child together. She testified defendant's nickname was "Mo-Mo." On March 1, 2010, Whorrall and defendant had driven to Danville to purchase marijuana. While driving around, they observed Forman sitting in his parked car. Whorrall denied following Forman or repeatedly driving past his vehicle. When Forman parked his car, Whorrall pulled the van up next to him. According to Whorrall, Forman "hopped out of his vehicle, and he screamed, 'What the fuck are you following us for?' " Whorrall testified defendant then shot Forman. She and defendant drove away and went back to Champaign. Whorrall testified defendant told her he shot Forman because "it was street shit" and "didn't concern [her]." When asked if Forman had a weapon, Whorrall responded, "I don't know."

¶ 7 On May 19, 2011, the jury convicted defendant of aggravated battery with a firearm and aggravated discharge of a firearm.

¶ 8 On July 1, 2011, defendant filed a posttrial motion arguing, *inter alia*, the trial court erred in denying his statutory right to a speedy trial (725 ILCS 5/103-5(a) (West 2010)), as well as his right to a speedy trial under the Intrastate Detainers Act (Detainers Act) (730 ILCS 5/3-8-10 (West 2010)). Defendant did not raise an argument regarding his constitutional right to a speedy trial.

¶ 9 On July 6, 2011, the trial court denied defendant's posttrial motion. That same day, the court sentenced defendant to 30 years in the Department of Corrections (DOC) with 355 days' credit.

¶ 10 On direct appeal, defendant argued (1) he was denied his constitutional right to a speedy trial where his trial did not begin until 14 months after his arrest and (2) the trial court erred in the way it instructed the jury regarding the reliability of an eyewitness identification. This court affirmed the trial court's judgment. *VanPelt*, 2013 IL App (4th) 110600-U.

¶ 11 On August 25, 2014, defendant filed a *pro se* postconviction petition, seeking relief under the Post-Conviction Hearing Act (Post-Conviction Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). His petition is 75 pages in length with 164 pages of exhibits. The petition alleges ineffective assistance of appellate counsel for failure to argue (1) defendant's statutory right to a speedy trial was violated (725 ILCS 5/103-5(a) (West 2010) and 730 ILCS 5/3-8-10 (West 2010)); (2) ineffective assistance of trial counsel; (3) selective enforcement of a statute related to his right to a speedy trial; (4) prosecutorial misconduct; (5) a *Brady* violation (*Brady v. Maryland*, 373 U.S. 83 (1968)); (6) a due-process violation for the State's intentional use or failure to correct the perjured testimony of Forman; (7) judicial bias; and (8) the accuracy of the

trial court record. Defendant raised additional issues outside the context of ineffective assistance of appellate counsel. Specifically, his challenges include: (1) a speedy-trial violation; (2) ineffective assistance of trial counsel; (3) selective enforcement of a statute; (4) prosecutorial misconduct; (5) a *Brady* violation; (6) a due-process violation for the State's intentional use or failure to correct the perjured testimony of Forman; and (7) judicial bias.

¶ 12 On September 29, 2014, the trial court, in a written order, dismissed the postconviction petition as frivolous and patently without merit.

¶ 13 This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 The Post-Conviction Act "provides a mechanism for criminal defendants to challenge their convictions or sentences based on a substantial violation of their rights under the federal or state constitutions." *People v. Morris*, 236 Ill. 2d 345, 354, 925 N.E.2d 1069, 1075 (2010). A proceeding under the Post-Conviction Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *People v. English*, 2013 IL 112890, ¶ 21, 987 N.E.2d 371. The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008).

¶ 16 The Post-Conviction Act establishes a three-stage process for adjudicating a postconviction petition. *English*, 2013 IL 112890, ¶ 23, 987 N.E.2d 371. Here, defendant's petition was dismissed at the first stage. At the first stage, the trial court must review the postconviction petition and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122–2.1(a)(2) (West 2014). 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). Our supreme court has held "a *pro se* petition seeking postconviction relief under the [Post-Conviction] Act for a denial of constitutional rights may be summarily dismissed 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 that is completely contradicted by the record. *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.

¶ 17 "In considering a petition pursuant to [section 122-2.1 of the Post-Conviction Act], the [trial] court may examine the court file of the proceeding in which the petitioner was convicted, any action taken by an appellate court in such proceeding and any transcripts of such proceeding." 725 ILCS 5/122-2.1(c) (West 2014); *People v. Brown*, 236 Ill. 2d 175, 184, 923 N.E.2d 748, 754 (2010). The petition must be supported by "affidavits, records, or other evidence supporting its allegations," or, if not available, the petition must explain why. 725 ILCS 5/122-2 (West 2014). Our review of the first-stage dismissal of a postconviction petition is *de novo*. *People v. Dunlap*, 2011 IL App (4th) 100595, ¶ 20, 963 N.E.2d 394.

¶ 18 A. Claims of Ineffective Assistance of Appellate Counsel

¶ 19 Defendant alleges he was denied his right to effective representation by appellate counsel because counsel failed to present several issues on direct appeal.

¶ 20 Claims of ineffective assistance of trial and appellate counsel are evaluated under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Enis*,

194 Ill. 2d 361, 377, 743 N.E.2d 1, 11 (2000). A defendant raising a claim of ineffective appellate counsel "must show both that appellate counsel's performance was deficient and that, but for counsel's errors, there is a reasonable probability that the appeal would have been successful." *People v. Petrenko*, 237 Ill. 2d 490, 497, 931 N.E.2d 1198, 1203 (2010). At the first stage of postconviction proceedings, "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." *Petrenko*, 237 Ill. 2d at 497, 931 N.E.2d at 1203 (citing *Hodges*, 234 Ill. 2d at 17, 912 N.E.2d at 1212). However, appellate counsel is not required to raise every conceivable issue on appeal, and counsel is not incompetent for refraining from raising meritless issues. *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 77, 962 N.E.2d 528.

¶ 21 *1. Failure To Challenge the Accuracy of the Transcripts*

¶ 22 Defendant claims appellate counsel should have filed a motion challenging the accuracy of the transcripts for the August 5, 2010, arraignment hearing. In his brief, defendant maintains the prosecutor "originally stipulated in open court that, (we would like to reinstate the $500,000 ***, ten percent bond)." Defendant alleges this is not correctly reflected in the transcript.

¶ 23 To establish the inaccuracy of the transcript with regard to the prosecutor's statement regarding the bond, defendant provides no affidavit or other proof the transcript is inaccurate other than to point out the transcript makes a single reference to the prosecutor as "Mr." instead of "Ms." The "Mr." versus "Ms." reference is obviously a typographical error, as the prosecutor is correctly referred to as "Ms." throughout the rest of the transcript. This single typographical error does not implicate the transcript as inaccurate in any other respect and

defendant has provided no other basis to assume the transcript is otherwise inaccurate.

¶ 24 Defendant's allegation regarding the prosecutor's bond statement is crucial with regard to his speedy-trial argument. Bond was originally set on March 3, 2010, with the issuance of the arrest warrant. At the August 5, 2010, arraignment, the following exchange occurred:

> "MR. [*sic*] LIVINGSTON: Ask the bond on the warrant to *stand*.
>
> THE COURT: The warrant's currently five hundred thousand (500,000) ten percent (10%)—that bond will *stand*."
>
> (Emphases added.)

¶ 25 "A reviewing court is bound by the certified record of proceedings in the trial court, and the record is presumed to be correct unless it can be shown to be otherwise." *People v. Bland*, 228 Ill. App. 3d 1080, 1086, 593 N.E.2d 639, 644 (1992). Here, clearly, the bond in effect on March 3, 2010, was ordered to remain in effect on August 5, 2010. The record is devoid of any reference to the State entering an "SOL" on the charges and reinstating them on August 5, 2010. Defendant provides no proof, beyond his own unsupported allegation, upon which to base this contention. Therefore, there was nothing in the record for appellate counsel to request to be corrected.

¶ 26 Since no reinstatement of the charges occurred, we will not discuss defendant's argument he should have been discharged under the authority of *People v. Powell*, 43 Ill. App. 3d 934, 357 N.E.2d 725 (1976), other than to note *Powell* was decided before the enactment of the Detainers Act and, therefore, did not consider the requirements of that statute.

¶ 27 Defendant's claim appellate counsel should have sought correction of the record lacks any legal or factual basis. Therefore, appellate counsel's performance was not deficient in

this regard.

¶ 28 *2. Failure To Raise the Violation of Defendant's Statutory Right to a Speedy Trial*

¶ 29 Defendant argues his appellate counsel on direct appeal should have raised the violation of his statutory right to a speedy trial under section 103-5(a) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/103-5 (West 2010)) because the trial court erred when it found he was subject to the speedy-trial provisions of the Detainers Act.

¶ 30 Three principal speedy-trial statutes exist. Section 103-5(a) of the Code creates an automatic 120-day speedy-trial right for persons held in custody on the pending charge and does not require a written demand for speedy trial to trigger the clock. 725 ILCS 5/103-5(a) (West 2010). "Unlike defendants who are released on bail, defendants who remain in custody before trial suffer the loss of their liberty before they are adjudicated guilty of a crime. Therefore, the legislature put the burden on the State to try the case within the time specified; the defendant has no burden to invoke the right to a speedy trial." *People v. Staten*, 159 Ill. 2d 419, 424-25, 639 N.E.2d 550, 553-59 (1994).

¶ 31 Section 103-5(b) of the Code creates a 160-day speedy-trial right for persons released on bond or recognizance, but it requires the person to file a speedy-trial demand to start the clock. 725 ILCS 5/103-5(b) (West 2010). "A defendant who is subject to this subsection retains his or her liberty during the interval between arrest and conviction; accordingly, the State is given a longer time in which to try the charges than would be available if the defendant were in custody awaiting trial. To invoke the 160-day period of this subsection, defendants who are on bail or recognizance must serve the State with a formal demand." *Staten*, 159 Ill. 2d at 425, 639 N.E.2d at 554.

¶ 32 Finally, the Detainers Act states subsection 103-5(b) of the Code applies to

"persons committed to any institution or facility or program of [DOC] who have untried complaints, charges[,] or indictments pending in any county of this State." 730 ILCS 5/3-8-10 (West 2010). Therefore, persons already incarcerated on unrelated charges enjoy a 160-day speedy-trial right, which begins to run only upon the filing of a demand. Like persons released on bond or recognizance, "defendants *** serving prison terms for existing convictions at the time they face trial on additional charges *** do not suffer a loss of liberty while awaiting trial on the pending charges. To exercise their statutory right to be tried within 160 days, they need only to comply with section 3-8-10." *Staten*, 159 Ill. 2d at 428, 639 N.E.2d at 555.

¶ 33 Here, defendant argues he should have been brought to trial under the 120-day speedy-trial provisions of section 105-3(a) of the Code because charges were filed against him on March 3, 2010, but he was not committed to DOC on the unrelated charge until March 19, 2010. However, in *People v. Lykes*, 124 Ill. App. 3d 604, 464 N.E.2d 849 (1984), the appellate court reached a contrary decision. In *Lykes*, the defendant was charged on March 15, 1983, and not transferred to DOC until March 21, 1983. *Lykes*, 124 Ill. App. 3d at 605, 464 N.E.2d at 850. Nevertheless, the *Lykes* court found "the [Detainers] Act applies to a person committed to the IDOC after his arrest on a pending charge as well as those already committed at the time charges are brought." *Lykes*, 124 Ill. App. 3d at 608, 464 N.E.2d at 852-53.

¶ 34 Here, defendant was clearly subject to the speedy-trial provisions of the Detainers Act. The trial court did not err in so ruling, and defendant's argument in this regard lacks any legal or factual basis. Therefore, appellate counsel's performance was not deficient for not raising this issue on direct appeal.

¶ 35 *3. Failure To Raise the Violation of Defendant's Right to a Speedy Trial Under the Detainers Act*

¶ 36 Although defendant maintains he was not subject to the Detainers Act (730 ILCS

5/3-8-10 (West 2010)), he also contends his appellate counsel on direct appeal should have argued his right to a speedy trial under the Detainers Act was violated because his trial did not begin until 161 days after he filed his written demand for a speedy trial.

¶ 37 Defendant filed his speedy-trial demand on December 8, 2010. The jury was picked on May 16, 2011, 160 days after his speedy-trial demand. The jury was sworn on May 17, 2011. Therefore, defendant argues (1) his trial did not actually begin until 161 days after his speedy-trial demand and (2) the trial court erred when it denied his oral motion to dismiss on speedy-trial grounds.

¶ 38 To satisfy the speedy-trial statute, it is well settled the trial commences when the trial court has "begun the process" of selecting the jury. The fact the panel is not complete until the expiration of the speedy-trial term is not controlling if the selection began within the term. *People v. Williams*, 59 Ill. 2d 402, 404-05, 320 N.E.2d 849, 850 (1974); *People v. Johnson*, 144 Ill. App. 3d 997, 999-1000, 495 N.E.2d 633, 635 (1986).

¶ 39 Here, jury selection began 160 days following defendant's speedy-trial demand, which satisfies the 160-day speedy-trial requirement of the Detainers Act and section 105-3(b) of the Code. The trial court did not err in denying defendant's oral motion to dismiss on speedy-trial grounds, and defendant's argument in this regard lacks any legal or factual basis. Therefore, appellate counsel's performance was not deficient for not raising this issue on direct appeal.

¶ 40 *4. Failure To Properly Argue Defendant's Constitutional Right to a Speedy Trial*

¶ 41 On direct appeal, defendant raised the alleged constitutional violation of his right to a speedy trial, arguing his trial did not begin until 14 months after his arrest. Defendant admitted he had not raised his constitutional right to speedy trial in his posttrial motion but asked this court to review his claim under the plain-error doctrine. We determined defendant was not

denied his constitutional right to a speedy trial and, therefore, found no need to engage in a plain-error analysis. *VanPelt*, 2013 IL App (4th) 110600-U, ¶¶ 28, 43. Defendant now argues his appellate counsel was ineffective for failing to properly argue his constitutional right to a speedy trial on direct appeal.

¶ 42 In *People v. Wright*, 2013 IL App (4th) 110822, 987 N.E.2d 1051, the defendant sought to relitigate an issue decided on direct appeal in a postconviction petition by couching it in an ineffective-assistance-of-counsel allegation. This court found, " 'Collateral estoppel, or issue preclusion, prevents relitigation of issues of law or fact that have previously been litigated and decided in an action involving the same parties or their privies.' " *Wright*, 2013 IL App (4th) 110822, ¶ 30, 987 N.E.2d 1051 (quoting *In re Huron Consulting Group, Inc.*, 2012 IL App (1st) 103519, ¶ 22, 971 N.E.2d 1067). In the direct appeal of the case *sub judice*, this court found no error regarding defendant's constitutional right to a speedy trial, and, therefore, defendant is collaterally estopped from relitigating this issue in his postconviction proceeding.

¶ 43 However, defendant now argues newly discovered evidence allegedly proving the date of his arrest would change the outcome of his case. As we noted on direct appeal, "Assertion of speedy trial rights is necessary before a court can reach the conclusion that a defendant's constitutional speedy trial rights have been violated." *VanPelt*, 2013 IL App (4th) 110600-U, ¶ 39. Defendant did not properly assert his right to a speedy trial until December 8, 2010. Therefore, the date of his arrest would not affect our earlier findings.

¶ 44 Defendant also suggests this court erroneously attributed delays to the defense in his direct appeal. This allegation is not supported by the record and does not require further discussion.

¶ 45 Appellate counsel's performance was not deficient in this regard.

¶ 46 B. Defendant's Statutory Right to a Speedy Trial
Under Section 103-5(a) of the Code

¶ 47 Defendant again raises the issue of a violation of his statutory right to a speedy trial, arguing he was subject to the 120-day speedy-trial provisions of section 103-5(a) of the Code (725 ILCS 5/103-5(a) (West 2010)). As already stated, defendant was subject to the Detainers Act and, therefore, the 160-day speedy-trial provisions of section 103-5(b) of the Code (725 ILCS 5/103-5(b) (West 2010)). See also *Lykes*, 124 Ill. App. 3d at 607, 464 N.E.2d at 852. Therefore, this claim is based upon an indisputably meritless legal theory and lacks an arguable basis in law.

¶ 48 C. Defendant's Right to a Speedy Trial
Under the Detainers Act and Section 103-5(b) of the Code

¶ 49 Defendant again raises the issue his statutory right to a speedy trial under the Detainers Act and section 103-5(b) of the Code was violated (725 ILCS 5/103-5(b) (West 2010); 730 ILCS 5/3-8-10 (West 2010)). He asserts he was not brought to trial in 160 days because the jury was picked on day 160 but "dismissed" without being "selected and sworn in" until the next day. As stated above, the trial commences when the trial court has "begun the process" of selecting the jury. See *Williams*, 59 Ill. 2d at 405, 320 N.E.2d at 850; *Johnson*, 144 Ill. App. 3d at 999-1000, 495 N.E.2d at 635. Therefore, this claim is based upon an indisputably meritless legal theory and lacks an arguable basis in law.

¶ 50 D. Defendant's Constitutional Right to a Speedy Trial

¶ 51 Defendant argues his constitutional right to speedy trial was not barred by *res judicata* because of newly discovered evidence. As stated above, defendant is collaterally estopped from relitigating this issue and the new evidence he alludes to would not entitle him to discharge under any speedy-trial claim. See *Wright*, 2013 IL App (4th) 110822, ¶ 30, 987

N.E.2d 1051. Therefore, this claim is based upon an indisputably meritless legal theory and lacks an arguable basis in law.

¶ 52 E. Defendant's Remaining Claims Are Forfeited

¶ 53 Defendant makes the following additional claims on appeal: (1) denial of effective assistance of trial counsel, (2) subjecting him to selective enforcement of a statute, (3) prosecutorial misconduct, (4) a *Brady* violation, (5) the State's knowing use of perjured testimony, and (6) judicial bias. Defendant has forfeited these claims because they could have been raised on direct appeal. Although defendant listed these claims under the claim of ineffective assistance of appellate counsel in the "Issues Presented for Review" portion of his brief, he did not develop them in the guise of ineffective assistance of appellate counsel in the argument section of his brief. Even had defendant done so, they are completely refuted by the record and meritless. As noted above, appellate counsel is not incompetent for refraining from raising meritless issues. *Wilborn*, 2011 IL App (1st) 092802, ¶ 77, 962 N.E.2d 528.

¶ 54 Postconviction proceedings are limited to constitutional issues that have not been, or could not have been, previously adjudicated. They are not a continuation of, or an appeal from, the original case. *People v. Harris*, 224 Ill. 2d 115, 124, 862 N.E.2d 960, 966 (2007). Accordingly, issues that could have been raised on direct appeal, but were not, are considered forfeited and, therefore, barred from consideration in a postconviction proceeding. *Petrenko*, 237 Ill. 2d at 499, 931 N.E.2d at 1204. Here, the aforementioned claims are based entirely on facts contained in the trial court record and, therefore, could have been raised on direct appeal. Defendant's failure to do so results in their forfeiture.

¶ 55 As stated above, if we were to consider these additional claims, we would find them all refuted by the record and without merit.

¶ 56 F. Request for Assignment to a Different Judge Upon Remand

¶ 57 Last, defendant argues this court should order the case to be heard by a different judge on remand. Because we have determined the trial court's summary dismissal was not in error, we need not address this final argument.

¶ 58 III. CONCLUSION

¶ 59 For the reasons stated, we affirm the trial court's summary dismissal of defendant's postconviction petition. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 60 Affirmed.