2016 IL App (4th) 130997-U

NO. 4-13-0997

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
January 19, 2016
Carla Bender
4th District Appellate
Court, IL

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from |
| Plaintiff-Appellee, | ) | Circuit Court of |
| v. | ) | Sangamon County |
| DARNELL M. SMITH, | ) | No. 05CF1083 |
| Defendant-Appellant. | ) | |
| | ) | Honorable |
| | ) | Leo J. Zappa, |
| | ) | Judge Presiding. |

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

**ORDER**

¶ 1 *Held*: The petition for postjudgment relief states no cognizable grounds for postjudgment relief.

¶ 2 Defendant, Darrell M. Smith, appeals from the dismissal of his petition for relief from judgment (735 ILCS 5/2-1401 (West 2012)). The office of the State Appellate Defender (appellate counsel) has moved for permission to withdraw from representing defendant, because appellate counsel has come to the conclusion that no reasonable argument could be made in support of this appeal. See Ill. S. Ct. R. 375(b) (eff. Feb. 1, 1994). We notified defendant of his right to file additional points and authorities by a certain date, but he has not done so. After reviewing the record, along with appellate counsel's motion and supporting memorandum, we agree with appellate counsel's assessment of the merits of this case. Therefore, we grant appellate counsel's motion to withdraw, and we affirm the trial court's judgment. Also, we direct

defendant to file with this court, within 14 days, a written explanation of why we should not impose sanctions on him for filing a frivolous appeal. See Ill. S. Ct. R. 375(b) (eff. Feb. 1, 1994).

¶ 3 I. BACKGROUND

¶ 4 A. The Criminal Complaint

¶ 5 The State charged defendant with burglary (720 ILCS 5/19-1(a) (West 2004)) in that, on August 17, 2005, he knowingly and without authority entered a building of Wayne Shures, doing business as "Car X," with the intent to commit a theft therein.

¶ 6 B. The Jury Trial

¶ 7 1. *The Testimony of Wayne Shures*

¶ 8 The jury trial occurred in July 2006.

¶ 9 Wayne Shures testified he was the owner of Car-X Auto Service (Car-X), an automotive repair franchise. Closing time at Car-X was 5:30 p.m.

¶ 10 On August 17, 2005, between 9 and 10 p.m., the alarm in the Car-X building went off. Upon receiving a call from the alarm company, Shures went to the building and found that the lower glass in one of the bay doors was broken out. Although things had been moved around on the counter, nothing in the building appeared to be missing.

¶ 11 Shures had given no one permission to be in the building after hours on that day. He did not know defendant.

¶ 12 2. *The Testimony of James Clancy*

¶ 13 On August 17, 2005, at 9:30 p.m., James Clancy and Mark Harwood were standing outside Burger King, talking, when the alarm went off at Car-X, less than a block away. One of them called 9-1-1. Clancy walked toward Car-X, which had lights on inside, and he saw

a "stocky figure," dressed in "a white shirt and some jean-type pants" running inside the building. This man ran from one side of the building to the middle of the building. Then he ducked, and somehow, he was suddenly outside the building. Clancy could see, by the lights of the parking lot, that this man was an African-American with little or no hair.

¶ 14 Clancy and Harwood climbed into their pickup trucks and drove toward Car-X to get a better look at the man. He jogged away from Car-X and walked across the road into a nearby field. Clancy followed the man in his truck, with his headlights on high beam, and, at one point, when the man emerged from the field, "he actually crossed right in front of [Clancy's] headlights," less than five feet away, and Clancy "came close to hitting him." Following along in his truck, he kept the man in sight until the police arrived. He pointed out the man to the police, who arrested him.

¶ 15 Clancy identified defendant, in court, as that man.

¶ 16 3. *The Testimony of Mark Harwood*

¶ 17 Mark Harwood testified that when the alarm went off at Car-X, he saw "a large black person with a white T-shirt and jeans running very quickly from the south to the north [side of the building]." This man came out of the building, ran across the road, and started walking nonchalantly, as if nothing had happened. Harwood and Clancy followed him in their vehicles, keeping him in sight, until the police arrived and arrested him.

¶ 18 In court, Harwood was unable to identify defendant as the man because he never saw the man's face that night.

¶ 19 4. *The Instruction on a Lesser Included Offense*

¶ 20 In the jury instruction conference, defense counsel told the trial court:

"MR. ELMORE: Yes, Your Honor, after talking to [defendant], we're asking the Court to instruct the jury on the lesser included offense of Criminal Trespass to Real Property.

Another option is we've discussed, off the record, was Attempted Burglary, which would be a Class 3 felony. I believe Criminal Trespass to Real Property is a Class C misdemeanor. I talked to [defendant,] and he elected today to have the jury, with the Court's permission, to instruct the offense of Criminal Trespass to Real Property.

THE COURT: I think I'm on solid ground. I'm more than willing to give you a lesser included, you just decide which one you want.

MR. ELMORE: Thank you for that consideration, and based upon conversations with [defendant], he's opting for the lesser included of Criminal Trespass, it was to Real Property.

THE COURT: [Defendant], is what you want to do.

THE DEFENDANT: That's correct, Judge."

¶ 21 The jury found defendant guilty of criminal trespass to real property and not guilty of burglary.

¶ 22 On July 19, 2006, immediately after the reading of the verdict, the trial court told defendant: "[Defendant], you've been in jail almost three months, I'll give you credit for time served, and judgment is against for the costs of proceedings." In other words, the sentence was time served.

¶ 23 C. The Petition for Relief From Judgment

¶ 24 On July 22, 2013, defendant filed a petition for relief from judgment. In his petition, he alleged that the prosecutor, Karen Tharp, had committed fraud, and had violated his civil rights, by charging him with burglary. He further alleged that the "stipulation of a lesser included offense of criminal trespass to land" was "100% unconstitutional" and a "fraud upon the court" because criminal trespass to real property really was not a lesser included offense of burglary.

¶ 25 D. The Dismissal of the Petition

¶ 26 For the following reason, the State moved to dismiss defendant's petition:

> "The Defendant's sole ground for post-judgment relief is that his constitutional rights were violated by the trial court's allowing the jury to consider the lesser included offense of criminal trespass to land. The facts of the jury instructions that included the lesser included offense to the original charge of Burglary were known to the Defendant at the time of the Defendant's trial, and in accord with *People v. Addison*, [371 Ill. App. 3d 941 (2007),] are insufficient to provide the defendant with his requested post-judgment relief."

¶ 27 The trial court agreed that, under *Addison*, defendant had no right to postjudgment relief, since defense counsel had requested the jury instruction on the lesser included offense of criminal trespass and, therefore, defendant would have known of that instruction at the time of the trial. The court further found the petition to be untimely, considering that defendant filed it

seven years after the entry of judgment—well beyond the two-year period in section 2-1401(c) (735 ILCS 5/2-1401(c) (West 2012)).

¶ 28 This appeal followed.

¶ 29 II. ANALYSIS

¶ 30 In his petition for postjudgment relief, defendant accuses the prosecutor of committing "fraud" by charging him with burglary. This bald accusation counts for nothing. See *People v. Jennings*, 48 Ill. 2d 295, 299 (1971) ("The conclusions and suppositions contained in his petition, unsupported by factual allegations, are not sufficient to sustain this action."). Just because the jury chose to convict defendant of criminal trespass to real property in lieu of burglary, it does not logically follow that the charge of burglary was fraudulent. Given the evidence, we can readily understand why the prosecutor would have believed that defendant had unlawfully and without authority entered Car-X with the intent to commit a theft therein. See 720 ILCS 5/19-1(a) (West 2004).

¶ 31 As for the remaining issue in the petition—the giving of an instruction on criminal trespass to real property—that is a fact of which defendant was aware at the time the trial court entered its judgment, *i.e.*, the sentence (*People v. Winston*, 2015 IL App (1st) 140234, ¶ 19). See *Addison*, 371 Ill. App. 3d at 945. Not only was defendant aware, on July 19, 2006, that the court had given this instruction to the jury, but he had personally agreed to the giving of this instruction. Even if, as defendant appears to assume, criminal trespass to real property was not included in burglary (but see *People v. Thomas*, 374 Ill. App. 3d 319, 325 (2007)), he "may not be heard to complain of error which he injected into his own trial" (*People v. Scott*, 148 Ill. 2d 479, 532 (1992)).

¶ 32 III. CONCLUSION

¶ 33 For the foregoing reasons, we grant appellate counsel's motion to withdraw, and we affirm the trial court's judgment. Also, we direct defendant to file with this court, within 14 days, a written explanation of why we should not impose sanctions on him for filing a frivolous appeal. See Ill. S. Ct. R. 375(b).

¶ 34 Affirmed.