

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).

2017 IL App (4th) 150753-U

NO. 4-15-0753

FILED

December 11, 2017
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.)	Champaign County
JAYSON J. JOHNSON,)	No. 12CF1154
Defendant-Appellant.)	
)	Honorable
)	Heidi N. Ladd,
)	Judge Presiding.

PRESIDING JUSTICE TURNER delivered the judgment of the court.
Justices Harris and Holder White concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court did not err in summarily dismissing defendant’s *pro se* postconviction petition as defendant was not arguably prejudiced by his trial and appellate counsel’s alleged ineffectiveness.

(2) This court does not have jurisdiction over defendant’s claim he is entitled to additional presentence custody credit pursuant to section 5-4.5-100(c) of the Unified Code of Corrections (730 ILCS 5/5-4.5-100(c) (West 2012)) because he did not raise this claim in his postconviction petition.

¶ 2 On September 2, 2015, the trial court summarily dismissed defendant Jayson J. Johnson’s postconviction petition. Defendant appeals, arguing the court erred in summarily dismissing his petition because it presented the gist of constitutional claims, including (1) his appellate counsel’s failure to raise defendant’s trial counsel’s ineffectiveness on direct appeal and (2) his trial counsel’s failure to call a certain witness who would have testified defendant was

a heroin user. Defendant also argues he is entitled to an additional 397 days of sentence credit against his sentence for time he was in custody in case No. 12-CF-1234. We affirm.

¶ 3

I. BACKGROUND

¶ 4

On August 22, 2013, after a jury trial, the trial court entered judgment against defendant on three counts of unlawful delivery of a controlled substance and two counts of unlawful possession with intent to deliver a controlled substance within 1,000 feet of a public park. In October 2013, the trial court sentenced defendant to concurrent terms of 8, 10, and 12 years in prison for the three unlawful delivery of a controlled substance convictions and 25 years in prison on the unlawful possession with intent to deliver convictions.

¶ 5

Defendant filed a direct appeal and made the following arguments: (1) the trial court violated his right to present a defense; (2) the State failed to correct false testimony denying him a fair trial; and (3) defense counsel was ineffective by failing to surrender defendant in exoneration of his bond. This court affirmed. *People v. Johnson*, 2015 IL App (4th) 131056-U, ¶ 3. We did not rule on defendant's claim his trial counsel was ineffective for not surrendering defendant's bond, finding the claim would be better raised in a postconviction petition where the record could be more fully developed. *Johnson*, 2015 IL App (4th) 131056-U, ¶ 52. However, in addressing defendant's forfeited claim he was denied a fair trial because the State failed to correct the false testimony of one of the State's witnesses, we noted the strength of the State's case against defendant when considering whether we could consider the forfeited claim pursuant to the plain error doctrine. *Johnson*, 2015 IL App (4th) 131056-U, ¶¶ 36-37.

“[T]he State's remaining evidence of defendant's guilt was overwhelming. [Sheriff's deputy Christopher] Darr testified to searching [confidential informant Christopher Riggs] and his vehicle prior to each of the three drug buys. Darr, or

other officers, conducted surveillance of Riggs before, during, and after the transactions with defendant. Upon return, Riggs no longer had the prerecorded funds but did have bags of heroin. On the date of the arrest, officers found defendant with 17 plastic bags of heroin in his possession, packaged ready for sale. He also had two cellular phones and \$1,200 in cash, both indicative of a drug dealer. A search of defendant's residence revealed 4 digital scales; over 900 plastic sandwich bags, some with missing corners; and heroin residue on a plate. See *People v. Ballard*, 346 Ill. App. 3d 532, 541, 805 N.E.2d 656, 664 (2004) (noting indicia of intent to deliver large amounts of cash, cellular phones, scales, and plastic Baggies). The totality of the evidence indicates defendant was engaged in dealing heroin ***." *Johnson*, 2015 IL App (4th) 131056-U, ¶ 42.

¶ 6 On June 8, 2015, defendant filed a *pro se* petition for postconviction relief. Among other things, defendant alleged his counsel in his direct appeal was ineffective for not arguing his trial counsel was ineffective for failing (1) to tender a limiting instruction regarding how the jury could consider evidence discovered in defendant's home, (2) to object to the State improperly eliciting expert statements from Deputy Darr, and (3) to object to Riggs's testimony about his history of drug addiction. Defendant argued the combined effect of these errors deprived him the right to a fair trial. He also alleged his trial counsel was ineffective for failing to call Cloressa Owens to testify defendant used heroin.

¶ 7 On September 2, 2015, the trial court summarily dismissed defendant's postconviction petition.

¶ 8 This appeal followed.

¶ 9 II. ANALYSIS

¶ 10 Pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-7 (West 2014)), a defendant can argue his conviction resulted from a substantial denial of his constitutional rights. *People v. Coleman*, 183 Ill. 2d 366, 379, 701 N.E.2d 1063, 1070-71 (1998). A defendant cannot raise an issue in postconviction proceedings he could have raised on direct appeal. *People v. Blair*, 215 Ill. 2d 427, 443-44, 831 N.E.2d 604, 614-15 (2005).

¶ 11 At the first stage of postconviction proceedings, the trial court independently reviews the postconviction petition and determines whether, taking the allegations in the petition as true, the petition is frivolous or patently without merit with no arguable basis in either law or fact. *People v. Tate*, 2012 IL 112214, ¶ 9, 980 N.E.2d 1100. The threshold for surviving the first stage of postconviction proceedings is low. *Id.* We review the summary dismissal of a postconviction petition *de novo*. *People v. Edwards*, 197 Ill. 2d 239, 247, 757 N.E.2d 442, 447 (2001).

¶ 12 As for the issues raised in his postconviction petition, defendant focuses this appeal on the alleged ineffectiveness of his trial counsel and his appellate counsel. A claim of ineffective assistance of counsel based on information contained in the appellate record may not be raised in a postconviction petition because it could have been raised on direct review. *Blair*, 215 Ill. 2d at 443-44, 831 N.E.2d at 614-15. An exception to this rule exists if defendant can establish his appellate counsel was also ineffective for failing to raise the issue on direct appeal. *People v. Moore*, 402 Ill. App. 3d 143, 146, 930 N.E.2d 1057, 1060-61 (2010).

¶ 13 To establish ineffective assistance of counsel, a defendant must establish both his counsel's performance was constitutionally deficient and he was prejudiced by counsel's performance. *Strickland v. Washington*, 466 U.S. 668, 691-92 (1984). To establish prejudice, a defendant must show a reasonable probability the result of the proceeding would have been

different but for counsel's deficient performance. *Strickland*, 466 U.S. at 694. To establish appellate counsel's ineffectiveness, a defendant must show his attorney's failure to raise an issue was objectively unreasonable and the attorney's failure prejudiced defendant. *People v. Flores*, 153 Ill. 2d 264, 283, 606 N.E.2d 1078, 1087 (1992).

¶ 14 At the first stage of postconviction proceedings, a petitioner does not have to prove his counsel was ineffective. A petition alleging ineffective assistance of trial or appellate counsel should not be summarily dismissed if counsel's performance arguably fell below an objective standard of reasonableness and defendant was arguably prejudiced. *People v. Hodges*, 234 Ill. 2d 1, 17, 912 N.E.2d 1204, 1212 (2009); *People v. Tate*, 2012 IL 112214, ¶ 19, 980 N.E.2d 1100.

¶ 15 A. Effectiveness of Appellate Counsel

¶ 16 Defendant argues he presented the gist of a constitutional claim based on his appellate counsel's failure to argue his trial counsel was ineffective for failing to (1) tender a limiting instruction regarding items discovered in defendant's home, (2) object to the State eliciting expert statements from Deputy Darr during his testimony, and (3) object to Riggs's testimony regarding his addiction history. We need not determine whether appellate counsel and trial counsel's performance fell below an objective standard of reasonableness because defendant was not arguably prejudiced by either his trial or appellate counsel's alleged ineffectiveness.

¶ 17 We first look at defendant's claim regarding a limiting instruction concerning evidence seized from defendant's home, including digital scales, plastic bags, and a photo of defendant holding money. Defendant has failed to provide any indication what kind of limiting instruction trial counsel should have requested. The State argues defendant did not raise this

specific argument in his postconviction petition and cannot raise it for the first time on appeal. We agree with the State. 725 ILCS 5/122-3 (West 2014).

¶ 18 Defendant's petition claimed he was denied a fair trial because the trial court denied defendant's motion *in limine* to exclude evidence found at defendant's home. Defendant did not allege his trial counsel was ineffective for not asking for a limiting instruction. Regardless of forfeiture, we fail to see how an instruction the jury should only consider this evidence for purposes of defendant's intent to commit the crimes in question would have been any help to defendant, considering the strength of the State's case absent the evidence found in defendant's home.

¶ 19 We next consider defendant's claim with regard to statements Deputy Darr made during his testimony. Darr testified it is common in the drug trade to change the initial location for a sale. Darr also testified the heroin the informant purchased from defendant was consistent with the type of heroin the police were currently seeing. Defendant argues Darr was not qualified to offer this testimony.

¶ 20 Again, defendant was not arguably prejudiced by these statements. This is not a situation where the State's case was built on circumstantial evidence. The State had a confidential source, Riggs, who testified he purchased heroin from defendant. The substance Riggs purchased was heroin. The confidential source also testified he saw defendant sell drugs to other individuals. Further, when the police arrested defendant, he was in possession of 17 packages of heroin, packaged ready for sale. The statements which defendant complains about were not needed to convict defendant of the charges in this case.

¶ 21 As to defendant's claim regarding Riggs's testimony about Riggs's addiction history, defendant again was not arguably prejudiced by this testimony. According to defendant,

Riggs's testimony regarding his addiction history was intended to make him sympathetic to the jury. Defendant also points to the fact Riggs's testimony was the only direct evidence linking defendant to the three unlawful delivery charges. This overstates the importance of Riggs's testimony. The State had other strong evidence establishing defendant's guilt from the controlled buys.

¶ 22 Deputy Darr testified Riggs and his vehicle were searched before all three controlled drug buys, a hidden camera captured Riggs meetings with defendant, Riggs was under police surveillance the entire time, and Riggs provided Deputy Darr with heroin after the meetings with defendant. While the hidden camera did not capture defendant handing Riggs the drugs, the procedures the police followed provided strong evidence Riggs purchased heroin from defendant.

¶ 23 Finally, defendant argues the cumulative effect of the alleged errors discussed above rendered the outcome of defendant's trial unreliable. Even assuming, *arguendo*, defendant's trial counsel erred as asserted by defendant, the cumulative effect of these errors did not arguably prejudice defendant. As we noted in deciding defendant's direct appeal, the State's case against defendant was overwhelming. *Johnson*, 2015 IL App (4th) 131056-U, ¶ 42.

¶ 24 B. Failure To Call Witness

¶ 25 Defendant next argues his postconviction petition stated the gist of a constitutional claim of ineffective assistance of trial counsel based on counsel's failure to call Cloressa Owens as a defense witness to testify defendant used heroin. As stated earlier, a petition alleging ineffective assistance of trial or appellate counsel should not be summarily dismissed if counsel's performance arguably fell below an objective standard of reasonableness

and defendant was arguably prejudiced. *People v. Hodges*, 234 Ill. 2d 1, 17, 912 N.E.2d 1204, 1212 (2009); *People v. Tate*, 2012 IL 112214, ¶ 19, 980 N.E.2d 1100.

¶ 26 Defendant argues his trial counsel presented a theory at trial that defendant was a heroin user and the heroin found in his vehicle was for personal use, not distribution. However, defense counsel did not subpoena any witnesses who would have corroborated this defense. Defendant contends Owens's testimony would have been helpful in fighting the charges of unlawful possession with intent to deliver.

¶ 27 Once again, even assuming defendant's trial counsel erred in not subpoenaing Owens to testify on defendant's behalf to help establish defendant used heroin, he was not arguably prejudiced by trial counsel's failure. Regardless of whether defendant personally used heroin, the evidence against him was overwhelming. The testimony Owens would have provided would not have exonerated defendant or provided him with any kind of reasonable alibi against the charges for which he was convicted.

¶ 28 C. Sentence Credit

¶ 29 Defendant was initially arrested in this case on July 18, 2012. He posted bond on July 20, 2012. That same month, on July 31, 2012, defendant was arrested on a separate unlawful possession with the intent to deliver charge in case No. 12-CF-1234. Defendant did not surrender his bond in this case—even though he was in custody in case No. 12-CF-1234—until his conviction in this case on August 22, 2013. After his conviction in this case, defendant was in custody on both this case and case No. 12-CF-1234 from August 22, 2013, through October 1, 2013, when he was sentenced. On October 9, 2013, the State dismissed the charges against defendant in case No. 12-CF-1234.

¶ 30 The State and defendant originally agreed defendant was entitled to 443 days of presentence credit in this case, which included the days when he was only in custody in case No. 12-CF-1234. However, the trial court disagreed with this calculation because defendant had not surrendered his bond in the present case until August 22, 2013. As a result, the court concluded defendant was not in custody for the charges in this case until August 22, 2013. The court found defendant was entitled to 46 days of presentence custody credit for the periods between July 18, 2012, and July 20, 2012, and then from August 22, 2013, until October 1, 2013.

¶ 31 Defendant argues he is entitled to an additional 397 days of sentence credit for the time he spent in custody in case No. 12-CF-1234 against his 25-year sentence pursuant to the plain language of section 5-4.5-100(c) of the Unified Code of Corrections (730 ILCS 5/5-4.5-100(c) (West 2012)) because “the conduct underlying his convictions in [this case] occurred prior to the conduct underlying his arrest in [case No.] 12-CF-1234” and were not credited against any other sentence. Section 5-4.5-100(c) provides:

“An offender arrested on one charge and prosecuted on another charge for conduct that occurred prior to his or her arrest shall be given credit on the determinate sentence or maximum term and the minimum term of imprisonment for time spent in custody under the former charge not credited against another sentence.” 730 ILCS 5/5-4.5-100(c) (West 2012).

¶ 32 Defendant did not raise this issue in his postconviction petition. While acknowledging this court’s opinions in *People v. Nelson*, 2016 IL App (4th) 140168, 49 N.E.3d 1007, and *People v. Morrison*, 2016 IL App (4th) 140712, 64 N.E.3d 821, which held a defendant cannot raise this claim for the first time when appealing the dismissal of a postconviction petition, defendant asks us to reconsider our rulings in those two cases. We

decline defendant's request and conclude we do not have jurisdiction to consider this issue.

However, assuming, *arguendo*, we did have jurisdiction, defendant's claim would fail pursuant to this court's decision in *People v. Clark*, 2014 IL App (4th) 130331, 15 N.E.3d 539.

¶ 33

III. CONCLUSION

¶ 34 For the reasons stated above, we affirm the summary dismissal of defendant's *pro se* postconviction petition. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2016).

¶ 35 Affirmed.