2017 IL App (4th) 160342-U

NO. 4-16-0342

FILED
December 29, 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.	)	Sangamon County
JOHN J. HALEREWICZ,	)	No. 11CF594
Defendant-Appellant.	)	
	)	Honorable
	)	Leslie J. Graves,
	)	Judge Presiding.

PRESIDING JUSTICE TURNER delivered the judgment of the court.
Justices Steigmann and DeArmond concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court granted appellate counsel's motion to withdraw and affirmed the trial court's second-stage dismissal of defendant's amended *pro se* postconviction petition.

¶ 2 In February 2012, a jury found defendant, John J. Halerewicz, guilty of driving while under the influence (DUI), aggravated DUI with a revoked license, and driving while his license was revoked. In April 2012, the trial court sentenced defendant to concurrent terms of 10 years' imprisonment for aggravated DUI and 3 years for driving while his license was revoked. Defendant filed a direct appeal, and this court affirmed his conviction and sentence. *People v. Halerewicz*, 2013 IL App (4th) 120388, 2 N.E.3d 333.

¶ 3 In September 2015, defendant filed an amended *pro se* postconviction petition. In January 2016, the trial court dismissed defendant's petition. The office of the State Appellate Defender (OSAD) was appointed to represent defendant on appeal. In October 2017, OSAD

filed a motion to withdraw as defendant's counsel on appeal citing to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). This court granted defendant leave to file a response to OSAD's motion by November 8, 2017. Defendant did not file a response. After reviewing defendant's *pro se* petition and the record in this case, we grant OSAD's motion to withdraw and affirm the trial court's second-stage dismissal of defendant's *pro se* amended postconviction petition.

¶ 4 I. BACKGROUND

¶ 5 In February 2012, a jury found defendant guilty of driving under the influence of alcohol (DUI), aggravated DUI with a revoked license, and driving while his driver's license was revoked. His DUI and aggravated DUI convictions merged for sentencing purposes. The trial court sentenced defendant to concurrent terms of 10 years' imprisonment for aggravated DUI and 3 years' imprisonment for driving while his license was revoked.

¶ 6 On direct appeal, defendant made the following arguments: (1) the trial court erred in refusing to define "ordinary care" for the jury; (2) the court erred in sentencing him as a Class X offender; and (3) the court abused its discretion in sentencing defendant. *Halerewicz*, 2013 IL App (4th) 120388, ¶ 2. This court affirmed defendant's conviction and sentence. *Halerewicz*, 2013 IL App (4th) 120388, ¶ 2.

¶ 7 On July 28, 2014, defendant filed a *pro se* postconviction petition. The trial court appointed counsel for defendant on November 6, 2014. On November 7, 2014, defendant filed a supplement to his *pro se* petition, which contained unsigned affidavits from alleged witnesses. On June 24, 2015, defendant filed a motion to dismiss his appointed counsel.

¶ 8 On July 14, 2015, the State filed a motion to dismiss defendant's petition for postconviction relief. In July 2015, the trial court granted defendant's request to dismiss counsel, and defendant proceeded *pro se*.

¶ 9 On September 18, 2015, defendant filed an amended *pro se* postconviction petition, claiming the trial court judge was biased against him and he received ineffective assistance of counsel. Defendant based his claim of judicial bias on the trial judge's statement she had personally been affected by alcohol. Defendant also points to the trial court's comments regarding defendant's lack of remorse and defendant and his family's hostility toward the court.

¶ 10 Defendant also argued other trial court rulings showed bias by the court. For example, the trial court allowed the State to amend the charging instrument and did not scold the State for the defects in the charging instrument. The court would not define the term "ordinary care" in response to a question from the jury. Further, the court denied (1) his motion for a directed verdict, (2) his third motion *in limine*, (3) his motion to sever his charge of driving while his license was revoked, and (4) his motion to bar the State from introducing evidence regarding the status of his driver's license.

¶ 11 Defendant also alleged his trial counsel was constitutionally ineffective. According to defendant, his trial counsel was ineffective for not objecting to changes to the charging instrument after the police officers testified. He also argues his trial counsel was ineffective for failing to call Kayla Nein and Betsey Kramzer as witnesses on defendant's behalf. Defendant alleged Nein, a bartender at the Converse Street Bar, would have testified defendant had four beers on the night of his arrest between 7 p.m. and 1 a.m., did not exhibit any signs of being "over served alcohol," and was capable of exercising ordinary care in operating a motor vehicle. Defendant alleged Kramzer would have testified defendant did not drink any alcohol while he was working for her.

¶ 12 Defendant also argued his trial counsel was ineffective because defendant wanted to testify but counsel threatened he would be found guilty and sentenced to six years in prison if

he testified. Defendant alleged counsel's threat caused him not to testify.

¶ 13 Defendant also argued he believed the wrong jury instructions were read to the jury "because there was much confusion as to what instruction[s] were given and a lot of house cleaning as the judge called it." Defendant questioned whether a reasonable-doubt instruction was given to the jury. He also contends the "ordinary care" instruction (IPI, Criminal, No. 23.29) should not have been given to the jury. Instead, defendant argued the jury should have been instructed the State had to establish his blood alcohol level was above a 0.08.

¶ 14 Defendant also argued his appellate counsel was ineffective because he did not raise the issue of judicial bias in his direct appeal.

¶ 15 Defendant attached letters from Sheri Halerewicz, Kashi Halerewicz Moser, Betsy Kramzer, and Kayla Nein. Kramzer and Nein's letters were not signed. On October 6, 2015, defendant filed a supplement to his amended petition. In the supplement, defendant stated he cannot have contact with Kayla Nein because she is now a correctional officer. However, defendant stated Nein was told by defendant's trial counsel not to show up for trial after defense counsel talked to her.

¶ 16 At a hearing on December 10, 2015, defendant told the trial court he was withdrawing his original postconviction petition and asked to be heard on the amended petition.

¶ 17 On January 13, 2016, the trial court dismissed defendant's amended postconviction petition.

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 Defendant appeals the second-stage dismissal of his amended postconviction petition. Based on our examination of the record, OSAD's motion to withdraw, and defendant's

amended petition, we conclude, as has OSAD, that an appeal in this cause is without merit.

¶ 21 The Post-Conviction Hearing Act (725 ILCS 5/122-1 to 7 (West 2014)) "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 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).

> "Because this is a collateral proceeding, rather than an appeal of the underlying judgment, a post-conviction proceeding allows inquiry only into constitutional issues that were not, and could not have been, adjudicated on direct appeal. [Citation.] Thus, issues that were raised and decided on direct appeal are barred from consideration by the doctrine of *res judicata*; issues that could have been raised, but were not, are considered waived." *People v. Pitsonbarger*, 205 Ill. 2d 444, 455-56, 793 N.E.2d 609, 619 (2002).

¶ 22 The Act establishes a three-stage process for adjudicating a postconviction petition. *English*, 2013 IL 112890, ¶ 23. 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). If the petition is not dismissed at the first stage, it advances to the second stage. 725 ILCS 5/122-2.1(b) (West 2014).

¶ 23 At the second stage, the trial court may appoint counsel, who may amend the petition to ensure defendant's contentions are adequately presented. *People v. Pendleton*, 223 Ill.

2d 458, 472, 861 N.E.2d 999, 1007 (2006). During this stage, the State may file an answer or move to dismiss the petition. 725 ILCS 5/122-5 (West 2014). A petition may be dismissed at the second stage "only when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation." *People v. Hall*, 217 Ill. 2d 324, 334, 841 N.E.2d 913, 920 (2005). A petitioner's allegations are taken as true unless the allegations are affirmatively refuted by the record. *People v. Domagala*, 2013 IL 113688, ¶35, 987 N.E.2d 767. At the second stage, defendant bears the burden of making a substantial showing of a constitutional violation. *Domagala*, 2013 IL 113688, ¶ 35. We review *de novo* the second stage dismissal of a postconviction petition. *Pendleton*, 223 Ill. 2d at 473.

¶ 24 Defendant's *pro se* amended postconviction petition included claims of ineffective assistance of counsel and judicial bias. We note any claim decided on direct appeal or that could have been decided on direct appeal may not be raised in a postconviction petition. *English*, 2013 IL 112890, ¶ 22. However, the doctrines of *res judicata* and forfeiture are relaxed where fundamental fairness so requires, where the forfeiture stems from the ineffective assistance of appellate counsel, or where the facts relating to the issue do not appear on the face of the original appellate record. *English*, 2013 IL 112890, ¶ 22.

¶ 25 We first look whether defendant made a substantial showing of a constitutional violations with regard to his claims of ineffective assistance of counsel. Some of defendant's claims of ineffective assistance of counsel could have been raised on direct appeal and are forfeited. For example, defendant argues his trial counsel was ineffective for not objecting to the court amending the charging instrument. This claim could have been raised on direct appeal.

¶ 26 Defendant also forfeited his claims the jury should have been given an instruction the State was required to establish his blood alcohol level was 0.08 and should not have been

given an "ordinary care" instruction. These claims also could have been raised on direct appeal.

¶ 27 Defendant did raise some claims of ineffective assistance of counsel that could not have been raised on direct appeal because they were based on information not contained in the appellate record. According to defendant, his trial counsel was ineffective because he threatened defendant not to testify. Defendant also alleges his trial counsel was ineffective because he failed to call two particular witnesses. Finally, defendant argues his counsel was ineffective for not objecting to the trial court's failure to give a reasonable doubt jury instruction and for making sure the trial court provided the correct jury instructions.

¶ 28 To make a substantial showing defendant's constitutional right to effective assistance of counsel was violated, defendant must show his counsel's behavior fell below an objective standard of reasonableness and absent counsel's deficient performance a reasonable probability exists the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-91 (1984). A strong presumption exists counsel's actions were not constitutionally deficient and were the result of sound strategy. *People v. Metcalfe*, 202 Ill. 2d 544, 561, 782 N.E.2d 263, 274 (2002).

¶ 29 We first address defendant's allegation his trial counsel was ineffective because he told defendant he would be found guilty if he testified and sentenced to six years in prison. According to defendant, this scared him into not testifying. However, defense counsel's advice did not preclude him from testifying. The trial court admonished defendant it was his right to choose whether to testify. In fact, the court specifically told defendant, "Nobody can force you, threaten or in any way intimidate you into not taking the stand." The court also told defendant, "What I am saying is you can go against your attorney's advice and take the stand." Defendant acknowledged he understood this. As OSAD points out in its motion, a defendant has no basis to

claim he was precluded from testifying by his attorney if he does not assert to the trial court he wants to testify. See *People v. McCleary*, 353 Ill. App. 3d 916, 923, 819 N.E.2d 330, 337 (2004).

¶ 30 Defendant also alleged his trial counsel was ineffective because he failed to call Kayla Nein and Betsy Kramzer as witnesses at his trial. He attached unsigned letters from both of these women to his petition. The Kramzer letter said defendant worked for her from 10 a.m. to 7 p.m. on the afternoon before his arrest and did not drink while he was working. The Nein letter said she was a bartender at the bar where defendant was before he was arrested, defendant only had four beers, and was capable of exercising ordinary care in operating a motor vehicle. Even if these were signed and notarized affidavits, defendant cannot establish he was prejudiced by his attorney's failure to call Kramzer and Nein as witnesses. What defendant did between 10 a.m. and 7 p.m. has no relevance in this case, considering he admitted to the police he was at a bar drinking prior to being stopped. Further, defendant had already told the police he had more alcohol to drink than Nein said he did. Even if defendant only had four beers, defendant was convicted based on his statements to police, the police officer's observations, and the video of defendant's stop and interactions with the police. Defense counsel's decision not to call either of these women was not objectively unreasonable, and defendant was not prejudiced by the fact they did not testify.

¶ 31 We next look at defendant's argument his counsel was ineffective for not objecting to the trial court's failure to give a reasonable doubt jury instruction and for making sure the trial court provided the correct jury instructions. Defendant has not made a clear allegation the jury was not properly instructed. Defendant pointed to alleged confusion regarding jury instructions and stated he "believes" the wrong instructions were read to the jury. He also "question[ed]" whether the jury was given a reasonable doubt instruction. Defendant's

speculations are not sufficient to establish a substantial denial of his constitutional rights. Regardless, the record does include a clean copy of the jury instructions in this case, including an instruction the State had to prove defendant guilty beyond a reasonable doubt.

¶ 32 We next consider defendant's claim the trial court was biased against him. Defendant could have raised his claim of judicial bias in his direct appeal but did not. However, defendant claims his appellate counsel was ineffective for not raising this issue in his direct appeal. If the record shows appellate counsel was not ineffective, defendant's judicial bias claim is forfeited.

¶ 33 Our supreme court has stated:

> "To succeed on a claim of ineffective assistance of appellate counsel, defendant must show that the failure to raise a particular issue was objectively unreasonable and that the decision prejudiced the defendant. [Citation.] 'Appellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence of counsel to refrain from raising issues which, in his or her judgment, are without merit, unless counsel's appraisal of the merits is patently wrong. Accordingly, unless the underlying issues are meritorious, defendant has suffered no prejudice from counsel's failure to raise them on appeal.' " *People v. Jackson*, 205 Ill. 2d 247, 267, 793 N.E.2d 1, 14 (2001), quoting *People v. Easley*, 192 Ill. 2d 307, 329, 736 N.E.2d 975, 991 (2000).

The record in this case refutes any claim defendant's appellate counsel was ineffective for not arguing on direct appeal the trial court was biased against defendant in this case.

¶ 34 Part of defendant's claim of judicial bias is based on rulings by the trial court against him in this case. However, our supreme court has stated "[a]llegedly erroneous findings

and rulings by the trial court are insufficient reasons to believe that the court has a personal bias for or against a litigant." *Eychaner v. Gross*, 202 Ill. 2d 228, 280, 779 N.E.2d 1115, 1146 (2002).

¶ 35 Defendant also takes issue with the trial court's comments at sentencing that she had been personally affected by alcohol. The trial court actually stated:

> "And trust me, [defendant] and family, I am not in any way, shape or form discounting the fact that you have a very serious drinking problem. I get that, and alcoholism has touched my life personally. I am extremely empathetic to people who have to deal with that disease."

The court's statement shows she had empathy for defendant and his family. This statement is not evidence of any judicial bias against defendant.

¶ 36 Defendant also argues the trial court showed bias against him by punishing him because she sensed hostility from defendant and his family. The record provides no indication the court based defendant's sentence on anything defendant's family did. In fact, at the sentencing hearing, the court noted she felt sorry for defendant's family even though she knew they would probably be upset by her decision.

¶ 37 At the hearing on defendant's motion to reconsider sentence, the trial court did comment on the hostility of defendant's family. However, this does not establish any judicial bias against defendant.

¶ 38 The trial court clearly did take defendant's lack of remorse into question in sentencing him. However, a defendant's lack of remorse is relevant to his rehabilitative potential. In sentencing a defendant, a trial court must balance a defendant's potential for rehabilitation against the seriousness of the offense. *People v. Blair*, 2015 IL App (4th) 130307,

¶ 33, 44 N.E.3d 1073. Defendant was eligible for a 30-year sentence in this case, but the court only imposed a 10-year sentence, which was 2 years less than the State's recommendation. This sentence is inconsistent with a judge who is biased against defendant. Neither the trial judge's rulings nor comments show any bias against defendant.

¶ 39 Our supreme court has stated:

> "A judge is presumed to be impartial even after extreme provocation. [Citation.] It is assumed that judges, regardless of their personal backgrounds and experiences in life, will be able to set aside any biases or predispositions they might have and consider each case in light of the evidence presented." *Jackson*, 205 Ill. 2d at 276.

Disqualification of a judge for bias would be constitutionally required only in the most extreme cases. *Jackson*, 205 Ill. 2d at 276.

¶ 40 Defendant's appellate counsel was not ineffective for not raising judicial bias in defendant's direct appeal. The record in this case does not support any such claim. Therefore, defendant's claim of judicial bias is forfeited.

¶ 41 Because defendant's *pro se* amended postconviction petition does not make a substantial showing of a constitutional violation, we grant OSAD's motion to withdraw and affirm the trial court's second stage dismissal of defendant's amended postconviction petition.

¶ 42 III. CONCLUSION

¶ 43 For the reasons stated, we affirm the trial court's second-stage dismissal of defendant's *pro se* amended postconviction petition.

¶ 44 Affirmed.