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2014 IL App (4th) 130407-U

NO. 4-13-0407

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
October 20, 2014
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Macon County
TYRONE E. JOHNSON,)	No. 09CF1715
Defendant-Appellant.)	
)	Honorable
)	Thomas E. Griffith, Jr.,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Knecht and Harris concurred in the judgment.

ORDER

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

¶ 2 Defendant, Tyrone E. Johnson, appeals the trial court's first-stage dismissal of his postconviction petition, arguing the court erred in finding the petition frivolous and patently without merit where he raised the gist of a meritorious claim of ineffective assistance of trial counsel. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In October 2009, the State charged defendant by information with (1) unlawful possession of a controlled substance with intent to deliver (more than 1 but less than 15 grams of heroin) with a prior unlawful possession of a controlled substance conviction (count I) (720

ILCS 570/401(c)(1) (West 2008)); (2) unlawful possession of a controlled substance with intent to deliver (more than 1 gram of heroin) with a prior unlawful possession of a controlled substance conviction (count II) (720 ILCS 570/401(d) (West 2008)); and (3) unlawful possession of a controlled substance (less than 15 grams of heroin) with a prior unlawful possession of a controlled substance conviction (count III) (720 ILCS 570/402(c) (West 2008)). That same day, the trial court appointed the public defender to represent defendant. Prior to trial, the State dismissed count I.

¶ 5 Before his trial, defendant filed several *pro se* motions. In his motion to dismiss counsel, defendant alleged his appointed counsel, *inter alia*, (1) failed to contest the basis for the search warrant, (2) wanted to make defendant "take time in [defendant's] case," and (3) held a grudge against defendant because defendant's sentence in a prior case—a case prosecuted by his appointed counsel—was reduced on appeal (see *People v. Johnson*, No. 4-94-1062 (July 12, 1995) (unpublished order under Supreme Court Rule 23)). In his "motion to [suppress evidence] and complaint of warrant," defendant alleged the grounds for the issuance of the warrant were not supported by the drugs or currency used for the controlled buy "because there [was] none." In his "motion for dismissal," defendant alleged, "in discovery to [the] warrant it clearly [showed the] police and task officers truly violated [his] rights" because the basis for the warrant (the heroin and "marked" currency) did not exist. In his "motion to dismiss do [*sic*] to lack of evidence," defendant alleged, *inter alia*, the grounds for the issuance of the search warrant were not adequate because (1) the police failed to recover the "marked" United States currency in the residence where the controlled buy of heroin allegedly occurred or on his person, and (2) the heroin allegedly purchased in the controlled buy was not presented to the court as evidence to

support the basis for the warrant. In his "motion to quash search warrant," defendant noted the complaint for the search warrant reflected Shannon Seal of the Decatur Street Crimes Unit stated she (1) followed an unknown person (Doe) to 1047 North Jordan Street, Decatur, Illinois; (2) shook down Doe for contraband; (3) sent Doe to the North Jordan Street address with "marked United States currency" to purchase heroin while Seal parked a viewable distance away; and (4) watched Doe enter and exit the residence. Defendant again alleged no evidence (the heroin and "marked" currency) was entered to support the grounds for the search warrant and to "justify an offense or crime took place." (The complaint for warrant does not say Seal provided Doe with "marked" United States currency.)

¶ 6 During a March 2010 hearing, the trial court acknowledged defendants motions and directed defendant to "reduce to writing any allegations he may have regarding his attorney." The court set the matter for an April 2010 hearing pursuant to *People v. Moore*, 207 Ill. 2d 68, 77-78, 797 N.E.2d 631, 637 (2003), following *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984).

¶ 7 On April 12, 2010, the trial court held a *Krankel* hearing. Defendant tendered a one-page writing comprised of three paragraphs. The court addressed each paragraph in turn. Paragraph one stated, "[Defense counsel] refused to help me in filing motions in [this] case on my behalf telling me in his twenty-some years in law, motion or motions would not do any good." The court asked defendant if there was anything else he wanted to add. Defendant replied, no, "that quite sums that." The court asked defendant's trial counsel whether he had any comment. Counsel replied:

"Judge, what I believe that refers to is that this case is a drug case

based on a search warrant. Upon my review of the basis for the warrant, looking at the complaint for search warrant and the search warrant itself, which I have shown to [defendant], obviously, he can't have a copy of because they are provided to me in discovery, but I told him I did not believe there was a sufficient basis on which to file a motion to suppress. I think that's the main thrust of his concern is that he does not—I have tried to explain what I believe the law to be to him, and I don't believe he thinks that's appropriate and would like to file a motion to suppress, and I don't think there is a basis for such."

¶ 8 Paragraph two stated, "When [defense counsel] comes to see me, he only comes leading to one option[:] for me to cop-out." The trial court again asked defendant's trial counsel whether he had any comment. Counsel replied he never told defendant or any other client the only option was to plead guilty. Counsel stated he told defendant the best option, under the circumstances, was not to proceed to trial. Counsel told defendant he could go to trial if he wanted but it would be a bad idea under the circumstances of the case. The court told defendant counsel's job was to give legal advice based on his experience and review of the case and inform defendant of his options so defendant could make an intelligent decision.

¶ 9 Paragraph three alleged, "[Defense counsel] clearly hasn't looked over my case, or he clearly just don't care. Because when I looked over my police report and preliminary transcripts[,] I see a lot of things helpful in my case." The trial court asked defense counsel for any comments on the allegation. Counsel declined to go into specifics because some issues

involved matters of trial strategy. The court stated it understood but asked counsel if he had reviewed the discovery. Counsel responded:

"I have reviewed it several times. In fact, I have been to see [defendant on] I think three occasions, including reviewing his— sending his police reports back to him on at least one other occasion. We always send the police reports to people in custody on one occasion initially when they are arrested. At his request[,] I sent them back to him along with the complaint for search warrant and the search warrant itself from which he could take notes. I have prepared on his case [to] the same degree that I would with any other case. I have actually [had] some more conversations with [defendant] at this stage than I do with many other clients."

¶ 10 The court then asked defendant if he had any comment. Defendant responded:

"Your Honor, I talked to [defense counsel] on several occasions where when he came up to see me the first time. It was based on trying to obtain a search warrant, you know, so I could see, you know, what—with the search warrant. I was in custody four months. I never had a search warrant inside of my police report for me to review or nothing, you know what I am saying, until four months after I was in here.

So, that key was my 120 days because I can't—if I can't look and see my police report in time, you know, what I am saying,

I mean it is no good for my 120 days if it takes him 120 days to show me my police report. [Defense counsel] was supposed to get the police report. I had got him 60 days after in custody. He didn't show me the police report until 120 days in custody, you know. He was supposed to c[o]me down here and file—to see the police report. When he came back to see me in 30 days he told me, well, the State had not got the police report, I will be back in a couple days. I didn't see him [until] 33 days later. And here it is, the police report, you know."

¶ 11 The trial court explained defendants have no right to receive the police reports. However, the public defenders usually give their clients the opportunity to look at the police report and search warrant. However, the State does not always provide all the information at once. Defense counsel stated defendant was given the basic reports early on. However, defense counsel did not have the copy of the complaint for the search warrant and the search warrant itself for some time. Defense counsel explained he did not want to file a motion to compel the State to produce because the State, while slow in this case, was usually very good in providing such items.

¶ 12 The trial court then asked defendant if he had anything else he wanted to state. Defendant replied:

"I was also told by [defense counsel] that the warrant that was issued for—to my arrest, he told me that I can't use the warrant in my case, you know. He said I cannot use the warrant. I said, well,

they used it to come in my house, but he was telling me, no, you can't use it. He was trying to get me off the subject of using the warrant, you know, and just worry about what was in the house. I was like, you know, but you used the warrant to come in my house[,] how come we can't start by using the warrant. [']Oh, we aren't going to worry about it, you can't use it.['] That is what he is telling me."

¶ 13 The trial court advised defendant, generally speaking, defense counsel was correct that in situations where the informant is anonymous he or she would not be called to testify unless "some very special[,] highly unusual[,] exceptional circumstances" existed. Defense counsel responded:

"Judge, that's really I think the central [issue] of [defendant's] dissatisfaction with my services, where it comes into play. As I said, he wanted us to contest the search warrant. I didn't believe[,] upon review[,] that there was a basis to contest. He believes that the informant for the search warrant was lying. I informed him that not only would we have to establish that, in fact, there was a material falsity based upon the [Jane] Doe informant, as the court correctly points out in this case there was, that we would also have to show[,] we have the burden of showing that the State was acting or the police were acting in bad faith.

In my opinion, my humble opinion, that did not exist in

sufficient quantity to be able to contest it with a motion to suppress in this case."

¶ 14 Defendant never raised the issue of defense counsel's purported conflict of interest at the pretrial hearing.

¶ 15 At the conclusion of the hearing, the trial court found the following:

"[A]s far as your motion today and your complaints about your attorney, the law is clear. There are no supporting facts or specific claims of ineffectiveness here. The allegations are conclusory and ambiguous. There simply is not a basis to find that you should be given a different attorney. *** [Y]ou have a Public Defender who has a lot of experience, and I am sure he will represent you to the fullest extent of his ability."

¶ 16 In May 2010, the case proceeded to jury trial. We recently addressed the details of the jury trial in *People v. Johnson*, 2012 IL App (4th) 100539-U, and will not repeat those details here. The jury found defendant guilty of counts II and III.

¶ 17 In June 2010, prior to sentencing, defendant *pro se* filed motions for arrest of judgment, a new trial, and to dismiss counsel. In his motion to dismiss counsel, defendant alleged the following:

"In a 1993 case in which I was found guilty, [my trial counsel] was the head prosecutor of the case. The charges were very serious to where if I was ever convicted of any serious charges, I [would be] eligible for [an] extended term. [My trial counsel] labeled me to

be a menace to society and I was sentence[d] to 31–thirty–one [sic] years. I later appealed, and a high court over[]turned the label menace to society, and I received a shorter sentence. I truly feel [my trial counsel] is not a counsel on my side because of our previous run in, I truly can say [my trial counsel] still feels the same as before about me."

¶ 18 During a June 2010 hearing on defendant's posttrial motions, defendant stated he did not think counsel represented him to the best of his ability. When defendant noticed defense counsel was his attorney, defendant tried to get him removed because of a conflict of interest. The trial court asked defendant's trial counsel if he had any comment with regard to defendant's motion. Counsel responded defendant had a disagreement with him over how to proceed in the case and the issue of his purported conflict of interest was not raised in court at the pretrial hearing. The State commented defendant's counsel had provided adequate representation throughout the proceeding. The court stated it had observed counsel's performance and characterized it as exemplary. The court also noted defense counsel's performance caused the jurors to have questions and take their time in deliberation, despite the fact the evidence presented by the State was overwhelming.

¶ 19 The trial court also observed this same issue was presented before a different judge prior to trial. The court concluded it appeared the previous judge considered the same allegations and found them meritless. (In fact, when defendant put all of his allegations about counsel in the three-paragraph document discussed above, he did not include his complaint about counsel's prior prosecution of defendant. Nor, when given a chance to add anything to his

motion at the April *Krankel* hearing, did defendant raise the purported conflict of interest.) The court explained defense counsel's prior job involved proving a person's guilt. The court stated counsel's job now was to defend people. The court noted counsel had done a good job in this case. The court found it was unlikely defendant's counsel had any personal feelings regarding defendant and stated the court's prior ruling on defense counsel's performance would stand.

¶ 20 During defendant's June 18, 2010, sentencing hearing, the trial court found defendant was subject to Class X sentencing due to his prior criminal record and sentenced defendant on count II to nine years' imprisonment, followed by a three-year term of mandatory supervised release (MSR).

¶ 21 On direct appeal, defendant argued the trial court erred in (1) failing to appoint new trial counsel to represent him where he alleged counsel had previously prosecuted him, and (2) sentencing him to a three-year term of MSR. This court affirmed the trial court's judgment. *People v. Johnson*, 2012 IL App (4th) 100539-U.

¶ 22 In February 2013, defendant filed a *pro se* postconviction petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2012)). In his petition, defendant (1) challenged the adequacy of the complaint used to obtain the search warrant that led to his arrest and conviction; (2) alleged he was denied his rights under the fourth and sixth amendments; and (3) alleged his trial counsel was ineffective for (a) refusing to challenge the validity of the complaint and warrant, (b) failing to adequately investigate the case, and (c) failing to discover defendant was in prison when the anonymous informant (Doe) claimed he had been selling heroin.

¶ 23 Defendant attached to the petition the complaint used to obtain the search warrant.

In the complaint, Detective Shannon Seal stated between October 24 and October 28, 2009, she met with "Jane Doe." Seal stated Jane Doe was an assumed name. Seal stated Doe knew Seal to be a police officer. Seal stated Doe was a confidential source for the Decatur police department. During the meeting, Doe told Seal she knew a black male named "Ty," who sold heroin. Doe stated she had known Ty "for over [two] years" and had known Ty "to sell heroin for at least [two] years." Doe also told Seal she had seen Ty with heroin for sale at least 10 times in the two weeks preceding the meeting. Doe described Ty and identified a photograph of defendant as the person she knew as "Ty."

¶ 24 Seal stated Doe was searched for United States currency and contraband and none was found. Seal issued Doe United States currency with which to purchase heroin from defendant. Seal followed Doe by covert surveillance to 1047 North Jordan Street, Decatur, Illinois. Doe had no contact with anyone en route to that location. Seal observed Doe exit 1047 North Jordan Street after spending a few minutes inside. Doe was again followed by covert surveillance to a meeting location with Seal. Doe had no contact with anyone between the time she exited 1047 North Jordan Street and when she met again with Seal. Doe handed Seal an amount of purported heroin—a small portion of which field-tested positive for heroin. Doe told Seal she had purchased the heroin from defendant at 1047 North Jordan Street with the United States currency issued by Seal. Doe said the address was defendant's residence.

¶ 25 In defendant's postconviction petition, he alleged there were a number of falsehoods in the complaint. Specifically, defendant maintained Doe could not have known him for over two years prior to October 2009 or to have sold heroin for at least two years prior to that time because he had been incarcerated from January 2007 to May 2008 on two prior convictions.

Defendant further maintained this also proved Doe could not have seen him with heroin for sale at least 10 times. Defendant argued these facts clearly established no probable cause existed for issuance of the search warrant and, therefore, the search violated his fourth- and fourteenth-amendment rights.

¶ 26 Defendant further alleged his trial counsel was ineffective for (1) refusing to challenge the validity of the complaint and warrant, (2) failing to adequately investigate the case, and (3) failing to discover defendant was in prison when Doe claimed he had been selling heroin. Defendant argued these falsehoods would have been brought to light and he would not have been convicted had counsel contested the validity of the search warrant.

¶ 27 Defendant also alleged his appellate counsel was unable to assist him properly and effectively because the search warrant and complaint for the warrant were not a part of the record.

¶ 28 In April 2013, the trial court summarily dismissed the postconviction petition as frivolous and patently without merit. The court found (1) even though defendant had been in the Department of Corrections (DOC) during part of the two-year period in which Doe said she knew defendant and knew him to sell heroin, defendant would have been released from DOC no later than May 2008, so the controlled buy between October 24 and 28, 2009, was "totally feasible"; (2) no facts supported defendant's claim his attorney's performance was objectively deficient; and (3) defendant's claim was barred by *res judicata* because defendant raised the claim of ineffectiveness of counsel for failing to bring the motion attacking the search warrant on direct appeal.

¶ 29 This appeal followed.

¶ 30

II. ANALYSIS

¶ 31 On appeal, plaintiff argues the trial court erred in dismissing his postconviction petition because he stated the gist of a claim his trial counsel was ineffective for failing to request a *Franks* (*Franks v. Delaware*, 438 U.S. 154, 155-56 (1978)) hearing on the grounds the confidential source, whose information was used to obtain the search warrant, lied. Defendant maintains this issue is not barred by forfeiture or *res judicata*. The State argues it is.

¶ 32 The Act provides a means for a defendant to challenge a conviction or sentence based on an alleged violation of federal or state constitutional rights. *People v. Pendleton*, 223 Ill. 2d 458, 471, 861 N.E.2d 999, 1007 (2006). At the first stage of postconviction proceedings, the trial court independently reviews the petition to determine whether it is "frivolous" or "patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2012). To avoid dismissal at this stage, the petitioner need only present the gist of a constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244, 757 N.E.2d 442, 445 (2001). Additionally, at this point in the proceedings, all well-pleaded allegations in the petition are taken as true and liberally construed in favor of the petitioner. *People v. Brooks*, 233 Ill. 2d 146, 153, 908 N.E.2d 32, 36 (2009). The summary dismissal of a postconviction petition at the first stage is reviewed *de novo*. *People v. Brown*, 236 Ill. 2d 175, 184, 923 N.E.2d 748, 754 (2010).

¶ 33 A petition may be dismissed at the first stage if it 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 has no arguable basis in law or fact if it is based on an indisputably meritless legal theory or a fanciful factual allegation. *Id.* at 16, 912 N.E.2d at 1212. A postconviction proceeding is limited to constitutional issues that have not been, or could not have been, previously adjudicated.

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. *People v. Petrenko*, 237 Ill. 2d 490, 499, 931 N.E.2d 1198, 1204 (2010). However, a postconviction claim that depends on matters outside the record is not ordinarily forfeited because such matters may not be raised on direct appeal. *People v. Youngblood*, 389 Ill. App.3d 209, 214, 906 N.E.2d 720, 725 (2009).

¶ 34 After reviewing the record in the case *sub judice*, we conclude the trial court properly dismissed defendant's *pro se* postconviction petition. Defendant raised the issue of his trial counsel's failure to contest the search warrant in his pretrial *pro se* "motion to dismiss counsel" and in his one-page response to the trial court's request he put all his complaints about his counsel in writing in preparation for a *Krankel* hearing. This complaint was extensively discussed at the *Krankel* hearing. Thus, the claim at issue here could have been raised on direct appeal, and defendant's failure to do so results in its forfeiture. See *Petrenko*, 237 Ill. 2d at 499, 931 N.E.2d at 1204.

¶ 35 Defendant argues this claim could not have been raised on direct appeal because he did not possess the complaint for the warrant or the search warrant until after his direct appeal. Clearly defendant had a copy of these documents before trial. Defense counsel advised the trial court he had provided a copy to defendant on two occasions before the *Krankel* hearing and in his various *pro se* filings defendant referenced the complaint and search warrant.

¶ 36 Further, defendant filed a *pro se* "motion to [suppress evidence] and complaint of warrant" and a *pro se* "motion to quash search warrant" prior to the *Krankel* hearing. In the motion to quash the search warrant, defendant noted the fact Seal stated she (1) followed Doe to

the residence, (2) shook her down for contraband, (3) sent Doe into the residence with currency to purchase drugs while Seal parked a viewable distance away, and (4) watched Doe enter and exit the residence. Defendant could have also noted the alleged inaccuracies in the complaint for the search warrant. However, defendant's issue with the warrant centered around the fact no marked currency or drugs were entered into evidence to support the warrant, not the accuracy of the informant's declarations to the police.

¶ 37 Forfeiture aside, defendant's claim of ineffective assistance of trial counsel is patently without merit. We apply the *Strickland* test to determine whether trial counsel rendered ineffective assistance. See *Strickland v. Washington*, 466 U.S. 668 (1984). Under the *Strickland* test, a defendant must show (1) counsel's performance was unreasonable, and (2) but for the error, there is a reasonable probability the outcome would have been different. *Strickland*, 466 U.S. at 689-94. Both prongs of *Strickland* must be met, and the failure to satisfy either prong precludes a finding of ineffective assistance of counsel. *People v. Patterson*, 192 Ill. 2d 93, 107, 735 N.E.2d 616, 626 (2000).

¶ 38 Based upon the record in this case, the police clearly had probable cause for the search warrant. Defendant was in prison between January 2007 and May 2008. Doe claimed to have known defendant for "*over two years*" and to have sold heroin for "*at least [two] years*." (Emphases added.) The fact these time frames overlap does not mean Doe could not have known defendant prior to his 2007-08 incarceration or that Doe was lying. More important, as the trial court noted, nothing in the record suggests defendant was still in prison in October 2009, when over a two-week period Doe observed defendant sell heroin at least 10 times and when defendant sold Doe heroin in a controlled buy. What occurred in October 2009 established

probable cause for the search warrant.

¶ 39 As a general rule, trial counsel's failure to file a motion that would be futile does not establish incompetent representation. See *People v. Givens*, 237 Ill. 2d 311, 331, 934 N.E.2d 470, 482 (2010) (counsel's failure to file a motion to quash arrest and suppress evidence does not constitute ineffective assistance when the motion would have been futile). In the case *sub judice*, a motion to suppress the evidence found in the house as a result of the search warrant would not have been successful. Therefore, defense counsel's failure to file a motion to suppress based on the search warrant would have been futile and could not be ineffective assistance of counsel.

¶ 40 III. CONCLUSION

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

¶ 42 Affirmed.