2017 IL App (1st) 150207-U

No. 1-15-0207

October 25, 2017

Third Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	Nos. 11 CR 13880
	)	11 CR 13881
	)	12 CR 13873
	)	
FREDRICK DAVIS,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Cobbs and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: Where defendant did not demonstrate that he would have not pled guilty if his trial counsel had investigated the potential witnesses, he did not state an arguable claim of prejudice under the second prong of the ineffective assistance of counsel analysis, and the trial court's summary dismissal of defendant's *pro se* post-conviction petition is affirmed.

¶ 2 Defendant Fredrick Davis appeals from the trial court's first stage summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.*

West 2010)). On appeal, defendant contends that his petition raised an arguable basis for an ineffective assistance of counsel claim based on his trial counsel's failure to investigate and discover exculpatory evidence that would have provided him with a plausible defense. He asserts that he would not have pled guilty if his counsel had investigated the defense. We affirm.

¶ 3 Defendant was charged in 3 separate cases with intent to deliver cocaine in the following amounts: less than 1 gram (720 ILCS 570/401(d) (West 2010)) in case No. 11 CR 13880, 15 grams but less than 100 grams (720 ILCS 570/401(a)(2)(A) (West 2010)) in case No. 11 CR 13881, and 100 grams or more but less than 400 grams (720 ILCS 570/401(a)(2)(B) (West 2010)) in case No. 12 CR 13873.

¶ 4 In case No. 11 CR 13881, the suspect cocaine was recovered after a search warrant was executed at 1254 North Harding, in Chicago, on July 12, 2011. An arrest warrant was issued and defendant was arrested on August 2, 2011, at 1254 North Harding with keys to the front door of that property as well as a driver's license with that address in his possession. Police also recovered cocaine from him, leading to the charge in case No. 11 CR 13880. Nearly a year later, defendant was again arrested on July 7, 2012, while out on bond, and found with 376 grams of cocaine, leading to the charge in case No. 12 CR 13873.

¶ 5 Defendant filed a "Motion to Suppress Evidence Seized Pursuant To An Invalid Search Warrant," in case No. 11 CR 13881, alleging that the search warrant "did not describe with particularity the place to be searched in that the Search Warrant stated that *only* 1254 N. Harding, Chicago, Illinois is to be searched." (Emphasis in original.) At the hearing on the motion, Chicago police officer Bala testified that a confidential informant informed him that he had purchased narcotics from defendant at 1254 North Harding Avenue, in Chicago. Defendant had

met the informant at the door and the informant waited in the living room area while defendant retrieved the narcotics. The Cook County Assessor's office listed the property as a single family residence and Bala's search in a law enforcement database showed defendant's name and "Apartment 1" listed for the property. Bala obtained a search warrant, which he executed on July 12, 2011. The warrant listed 1254 North Harding as a single family residence.

¶ 6 Bala testified that, when he entered the property, there was a door to the left and a stairwell going up to the second floor, which was an "illegal apartment," as it was not documented by the city for tax purposes. The residents on the second floor told Bala that defendant was not at the residence but that he was their landlord. Bala then searched only the first floor unit, where the police recovered the suspect cocaine. The trial court denied defendant's motion to suppress.

¶ 7 On July 13, 2013, the State told the trial court that it had offered defendant a plea deal of a total of 13 years in prison for all 3 charges. Defense counsel initially informed the trial court that defendant wanted to reject the State's plea offer. The trial court asked defendant, "Is that what you your lawyer told you, thirteen years all together?" Defendant responded, "Yes." Then, the trial court stated, "All right. You don't wish to accept that offer of thirteen years? I'm not saying you should or shouldn't." Defendant then requested that the trial court give him time to think about it. After defendant spoke with his mother and wife for about 25 minutes, defense counsel informed the trial court that defendant wanted to accept the State's plea offer.

¶ 8 In exchange for defendant's guilty plea in all 3 cases, the State agreed to the following: (1) in case No. 11 CR 13881, the State would reduce the charge from intent to deliver 15 grams to 100 grams of cocaine, a Class X felony, to intent to deliver 1 to 15 grams, a Class 1 felony,

and defendant would serve 4 years in prison; (2) in case No. 11 CR 13880, a Class 2 felony, defendant would serve 4 years in prison, to be served concurrently with case No. 11 CR 13881; and (3) in case No. 12 CR 13873, a Class X felony, defendant would serve 9 years in prison, to be served at 75 percent and consecutively to the other 2 cases.

¶ 9 The State informed the trial court of defendant's prior convictions. The trial court read the charges to defendant and explained the sentencing ranges for each offense, which totaled a sentencing range of 13 to 70 years. It told defendant, "Your lawyer indicates you wish to plead guilty for a total sentence for all three cases of thirteen years in the Department of Corrections, four at 50 percent, and the third one at 75 percent, is that your understanding?" Defendant responded, "Yes, sir." The trial court explained the rights defendant was giving up by pleading guilty. Defendant indicated that he still wanted to plead guilty to all three charges, no one used force or threats to cause him to plead guilty, and he was pleading guilty freely and voluntarily.

¶ 10 The State presented its factual basis for each case. In case No. 11 CR 13881, the State explained that, if the case went to trial, the evidence would show that, on July 12, 2011, Chicago police officers executed a search warrant at 1254 North Harding. The officers found suspect cocaine, several pieces of mail from the United States post office, a scale, and narcotics packaging. The State explained that "[t]he proof of residency was addressed to this Defendant at that address." The forensic analyst would have testified that the recovered substance tested positive for cocaine.

¶ 11 In case No. 11 CR 13880, the parties stipulated that "the information set forth in the arrest report of Officer O'Brien, contained an amount of cocaine that tested positive for less than fifty grams." The report shows that defendant was arrested on August 2, 2011, at 1254 North

Harding Avenue and that the attesting officer recovered from defendant the following items: a "black knotted plastic baggie containing a white rocklike substance suspect cocaine," $541 in U.S. currency, metal keys that opened the front door of 1254 North Harding Avenue and a driver's license with that same address. The report also indicates that the approximate weight of the recovered substance was 1 gram.

¶ 12 In case No. 12 CR 13873, the parties stipulated "that information set forth in the arrest report of Officer Town *** it tested positive for cocaine in the amount of less than 400 grams." The report indicates that defendant was arrested on July 7, 2012, and that the weight of the recovered substance was 376 grams.

¶ 13 The trial court found that defendant understood the nature of the charges of each case and that a factual basis existed for the plea agreement. Under the plea agreement, the trial court sentenced defendant to 4 years in prison for cases No. 11 CR 13880 and 11 CR 13881, to be served concurrently, and 9 years in prison for case No. 12 CR 13873, to be served consecutively with the 2 other cases, for a total of 13 years in prison. Defendant did not move to withdraw his plea or file a direct appeal.

¶ 14 On September 30, 2014, defendant filed a *pro se* "Post Conviction Petition for Relief." He alleged, among other things, that he "made an uninformed decision, totally in [r]eliance" of his attorney's "misinformation" about the terms of his plea deal and that, as a result, he entered the guilty plea "involuntarily" and "unintelligently." He also alleged that his attorney "failed to investigate, locate, and interview all witnesses provided by the petitioner for the purposes of presenting, and or formulating a formidable defense," that he provided names of potential

witnesses to his attorney, and that his attorney did not contact those witnesses or use a private investigator to "interview, investigate or locate any potential witnesses."

¶ 15 To support his petition, defendant attached his own affidavit as well as affidavits from his "family members," Mary Davis, Steven Davis, and Camisha Tanner. Mary Davis and Steven Davis averred that defendant's trial counsel told them incorrect information about the terms of the plea agreement. Defendant averred that he entered his plea "misinformed and utterly ignorant," as his attorney did not convey the terms of the plea deal to him and told his brother, wife, and mother incorrect information about the terms of the plea deal. Defendant further attested, among other things, that his defense counsel "never acknowledged the names of potential defense witnesses, never hired a private investigator to locate, investigate, or interview none of the available witnesses for the defense."

¶ 16 Mary Davis and Camisha Tanner attested that defendant did not reside at 1254 North Harding on July 12, 2011, the date the cocaine was recovered. Mary Davis averred that "I move from 1254 N. Harding, Chicago, IL on Feb 01-2010 [t]o 6112 W. Diversey, Chicago, IL Apt. 1-A on Feb-01-2012. Alone [*sic*] with Frederick Davis. He moved out on Oct. 15, 2010 to [a] [n]ew [h]ome [l]ocated [a]t 8608 S. Union Chicago, IL" with Tanner, where he lived until he was arrested in July 2012. Tanner attested that she lived at 1254 North Harding until February 1, 2010, when she moved to "6112 W. Diversey in Chicago along with Fredrick Davis." Steven Davis attested that he lived at 1254 North Harding, Unit 1, from November 1, 2010, to July 15, 2011, and had acted as the building manager.

¶ 17 On November 26, 2014, the trial court issued a written order dismissing defendant's postconviction petition. In the order, the trial court discussed defendant's contentions that he was

misled that he would receive a 6 year sentence and "was coerced into entering an *open plea of guilty*" which led to a 13 year prison sentence. (Emphasis in original.) The trial court then found that the "*record, however, belies Davis' contentions,*" and defendant's "petition is patently frivolous and without merit." (Emphasis in original.) It stated defendant had entered a negotiated plea rather than an open plea, defendant "received the exact sentences that he bargained for," and the court "considered *all of the issues raised* by petitioner." (Emphasis in original.)

¶ 18 On appeal, defendant contends that he raised an arguable basis of an ineffective assistance of counsel claim in his petition based on his trial counsel's failure to investigate a plausible defense. He asserts that there is a reasonable probability that he would not have pled guilty if his trial counsel had investigated the defense, as his trial counsel would have discovered that he was not a resident of 1254 North Harding at the time the cocaine was recovered from that location and, therefore, the State would not have been able to prove that he constructively possessed the drugs.

¶ 19 Although the plea agreement encompassed all three separate cases, defendant's argument on appeal applies only to case No. 11 CR 13881, as this is the only case that involves cocaine recovered from 1254 North Harding. It does not pertain to the cocaine found in defendant's possession in his other two cases, which arose weeks (11 CR 13880) and a year (12 CR 13873) later. While defendant argues generally that he "would not have pled guilty" had his attorney investigated his residence at the time the drugs were recovered for case No. 11 CR 13881, he does not argue on appeal that this alleged defense impacted his guilty plea for the other two cases. We presume, therefore, that defendant would have accepted a plea in these other cases despite his attorney's alleged failure to investigate the defense in case No. 11 CR 13881. Further,

as defendant does not argue on appeal that, had his attorney investigated the alleged defense in case No. 11 CR 13881, he would not have pled guilty to the other two cases, he has forfeited any argument that the trial court improperly dismissed his postconviction petition on this basis with respect to these two convictions. Ill. S.C. R. 341(h)(7), (i) (eff. Jan. 1, 2016) ("Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.")

¶ 20 As an initial matter, the State argues that defendant has forfeited his claim that he would not have pled guilty if his trial counsel had interviewed his witnesses because he did not assert this claim in his postconviction petition. We disagree.

¶ 21 If a claim is not raised in the original petition then it may not be raised for the first time on appeal. *People v. Pendleton*, 223 Ill. 2d 458, 475 (2006); 725 ILCS 5/122-3 (West 2010). However, "[b]ecause a *pro se* petitioner will likely be unaware of the precise legal basis for his claim, the threshold for survival is low, and a *pro se* petitioner need allege only enough facts to make out a claim that is arguably constitutional for purposes of invoking the Act." *People v. Thomas*, 2014 IL App (2d) 121001, ¶ 48.

¶ 22 Here, in defendant's *pro se* petition, he alleged, among other things, that he entered into the guilty plea "unknowingly and not intelligently" and that his trial counsel "failed to investigate, locate, and interview all witnesses provided by the petitioner for the purposes of presenting, and or formulating a formidable defense for presentation before a jury trial." On appeal, defendant contends that his trial counsel was ineffective because he failed to investigate and discover exculpatory evidence and that, if he would have done so, he would not have pled guilty.

¶ 23 While defendant did not specifically allege in his petition that he would not have pled guilty if his trial counsel had investigated witnesses, he expressly alleged that he entered the guilty plea involuntarily and unintelligently as a result of his attorney providing incorrect information to him about his plea deal and that his trial counsel was ineffective for failing to investigate all witnesses. Viewing these allegations liberally, we conclude that his petition bears some relationship to the issues raised on appeal and that they are not novel but are based on the same underlying subject matter as the petition. Therefore, with respect to case No. 11 CR 13881, defendant has not forfeited his argument that he would not have pled guilty if his trial counsel had investigated the witnesses. See *Thomas*, 2014 IL App (2d) 121001, ¶¶ 48, 66, 87 (noting that the defendant's petition and the postconviction appellate arguments related to the same underlying issue and concluding that arguments in the defendant's appeal were not forfeited, as "the assertions in the petition need bear only 'some relationship' to the arguments raised on appeal.") (quoting *People v. Mars*, 2012 IL App (2d) 110695, ¶ 32).

¶ 24 Under the Post-Conviction Hearing Act, a defendant may attack a conviction by asserting that it resulted from a substantial denial of his or her constitutional rights. 725 ILCS 5/122-1 *et seq.* (West 2010); *People v. Tate*, 2012 IL 112214, ¶ 8. A postconviction action is a collateral attack on the judgment rather than a direct appeal from the conviction. *Id.* In noncapital cases, the postconviction petition process involves three stages. *Id.* ¶ 9. In the first stage, which applies to this case, the trial court independently reviews the petition, takes all allegations as true, and determines whether the petition is "frivolous or patently without merit." *People v. Hodges*, 234 Ill. 2d 1, 10 (2009).

¶ 25 The trial court may summarily dismiss a petition "as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact," meaning that it is "based on an indisputably meritless legal theory or a fanciful factual allegation," *i.e.*, a legal theory that is "completely contradicted by the record." *Hodges*, 234 Ill. 2d at 16. In this first stage, the allegations of fact are considered true, "so long as those allegations are not affirmatively rebutted by the record." *People v. Thomas*, 2014 IL App (2d) 121001, ¶ 47. We must construe postconviction petitions "liberally" and "allow borderline petitions to proceed." *Thomas*, 2014 IL App (2d) 121001, ¶ 5. Our review of the trial court's dismissal of a postconviction petition is *de novo. Hodges*, 234 Ill. 2d at 9.

¶ 26 In the first stage of a postconviction petition proceeding, a petition that alleges 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." *Hodges*, 234 Ill. 2d at 17. Because a defendant must prove both elements, we may review the prejudice prong first. *People v. Gray*, 2012 IL App (4th) 110455, ¶ 25.

¶ 27 Defendant here was convicted pursuant to a negotiated guilty plea. With respect to a guilty plea, a counsel's conduct is considered deficient if he or she "failed to ensure that the defendant entered the plea voluntarily and intelligently." *People v. Rissley*, 206 Ill. 2d 403, 457 (2003). To prove prejudice, "a defendant must show that there is a 'reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.' " *Rissley*, 206 Ill. 2d at 457 (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). A "bare allegation" that a defendant would have demanded trial and pled not guilty if his or her trial

counsel had not been deficient is not sufficient to establish prejudice. *People v. Hall*, 217 Ill. 2d 324, 335 (2005). Instead, a defendant's "claim must be accompanied by either a claim of innocence or the articulation of a plausible defense that could have been raised at trial." *Hall*, 217 Ill. 2d at 335-36.

¶ 28 Proceeding directly to the prejudice prong, we find that defendant has failed to show arguable prejudice because he has not demonstrated that, if his trial counsel had investigated his potential witnesses, he would not have pled guilty. We note, as discussed above, defendant's argument only applies to the element of constructive possession of the cocaine recovered in case No. 11 CR 13881, and he does not argue that, had his counsel investigated the potential witnesses, he would not have pled guilty to the other two cases that encompassed the plea agreement.

¶ 29 Because the alleged error is a failure to investigate or discover exculpatory evidence, the question of whether the error prejudiced defendant depends on the likelihood that the discovery of the evidence would have led defendant's trial counsel to change his recommendation as to the guilty plea. See *Gray*, 2012 IL App (4th) 110455, ¶¶ 47, 49 (citing *Hill*, 474 U.S. at 59). Mary Davis and Camisha Tanner allege in their affidavits that defendant did not live at 1254 North Harding when the drugs were discovered there. If defendant's trial counsel had investigated and obtained this information from them, it is unlikely that this evidence would have led him, as a "rational person with sound judgment" (*Gray*, 2012 IL App (4th) 110455, ¶¶ 47, 49), to change his recommendation that defendant accept the plea, which applied to his three separate cases, rather than go to trial.

¶ 30 To prove that defendant constructively possessed the cocaine recovered from 1254 North Harding, the State would have had to prove at trial that defendant had knowledge of the cocaine and that defendant exercised "immediate and exclusive control over the area" where the cocaine was recovered. *People v. Maldonado*, 2015 IL App (1st) 131874, ¶ 23. From the motion to suppress and the guilty plea hearings, the record shows that the State was prepared to present the following evidence to prove defendant constructively possessed the cocaine recovered at 1254 North Harding in case No. 11 CR 13881: (1) defendant sold drugs to a confidential informant at 1254 North Harding; (2) when Bala searched the address in the law enforcement database, defendant's name came up next to apartment one; (3) when Bala executed the search warrant, the second floor residents informed him that defendant was not at the residence but that he was their landlord; (4) during the execution of the search warrant, several pieces of mail were recovered, and "proof of residency was addressed to this Defendant at that address"; (5) defendant was later arrested at 1254 North Harding; (6) when defendant was arrested, keys that opened the front door of 1254 North Harding and a driver's license with that address were recovered from him.

¶ 31 For defendant, Mary Davis and Camisha Tanner would merely have testified that defendant did not live at 1254 North Harding on the date the drugs were recovered, July 12, 2011. According to Steven Davis's affidavit, he would have only testified about when he lived at that residence and not when defendant resided there. Further, these witnesses, as family members, probably would have been considered to be biased in defendant's favor. See *Gray*, 2012 IL App (4th) 110455, ¶¶ 37, 52 (the court affirmed the trial court's summary dismissal of the defendant's first-stage postconviction petition, noting that one of the affiants was the defendant's wife and "probably would be considered to be biased in his favor").

¶ 32 Given the State's overwhelming evidence recited above, we cannot find arguable prejudice, as no rational defendant would have elected to proceed to trial to attempt to meet the State's extensive evidence with the evidence contained in the affidavits. See *Gray*, 2012 IL App (4th) 110455, ¶¶ 52-53.

¶ 33 Furthermore, because a defendant's control of the premises where contraband is found is not required to support the element of constructive possession (*People v. Minniweather*, 301 Ill. App. 3d 574, 578 (1998)), the fact that defendant did not reside at 1254 N. Harding on the date the cocaine was recovered would not have been a complete defense to the offense. Thus, given the State's overwhelming evidence and that his control over 1254 North Harding would not have been a complete defense, defendant was not prejudiced by his counsel's failure to investigate the defense.

¶ 34 Accordingly, because defendant has not demonstrated that he would have not pled guilty if his trial counsel had investigated the potential witnesses, he did not state an arguable claim of prejudice and, thus, has not presented an arguable claim for ineffective assistance of counsel in his postconviction petition.

¶ 35 Finally, we note that the mittimus for case No. 12 CR 13873 indicates that the sentence for this case would be served concurrently with the sentences imposed in case Nos. 11 CR 13880 and 11 CR 13881. However, under the plea agreement, the trial court orally pronounced that the sentence for case No. 12 CR 13873 was consecutive with the sentences imposed in case Nos. 11 CR 13880 and 11 CR 13881. Because the trial court's oral pronouncement controls (*People v. Jones*, 376 Ill. App. 3d 372, 395 (2007)), under Illinois Supreme Court Rule 615(b)(1) (eff. Jan. 1, 1967), we order the clerk of the circuit court to correct the mittimus to reflect that the sentence

is case No. 12 CR 13873 is to be served consecutively with the sentences in case Nos. 11 CR 13880 and 11 CR 13881.

¶ 36 For the reasons explained above, we affirm the judgment of the circuit court and order correction of the mittimus.

¶ 37 Affirmed; mittimus corrected.