2014 IL App (2d) 130950-U
No. 2-13-0950
Order filed October 17, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. LARRY R. BARRETT, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 06-CF-3716 Honorable Blanche Hill Fawell, Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Zenoff and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly summarily dismissed defendant's postconviction petition, which alleged that trial counsel was ineffective for failing to procure a stipulated bench trial, which would have allowed defendant to challenge on direct appeal the denials of his motions to suppress: defendant was not arguably prejudiced, as on direct appeal he could not have successfully argued that his first motion had merit or that counsel was ineffective for failing to present certain testimony at the hearing on the second motion.

¶ 2 Defendant, Larry R. Barrett, appeals from the order of the circuit court of Du Page County dismissing his postconviction petition at the first stage. Because neither of his claims of ineffective assistance of trial counsel alleged the gist of a constitutional claim, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted on five counts of residential burglary (720 ILCS 5/19-3(a) (West 2006)), two counts of home invasion based on his having choked the victim (720 ILCS 5/12-11(a)(2) (West 2006)), six counts of home invasion based on his having sexually assaulted or sexually abused the victim (720 ILCS 5/12-11(a)(6) (West 2006)), six counts of aggravated criminal sexual assault based on his having caused bodily harm to the victim (720 ILCS 5/12-14(a)(2) (West 2006)), two counts of aggravated criminal sexual assault based on his having endangered the life of the victim (720 ILCS 5/12-14(a)(3) (West 2006)), two counts of aggravated criminal sexual assault based on his having forcibly placed his penis in the victim's vagina during a residential burglary (720 ILCS 5/12-14(a)(4) (West 2006)), two counts of criminal sexual assault based on his having forcibly placed his penis in the victim's vagina (720 ILCS 5/12-13(a)(1) (West 2006)), one count of criminal sexual assault based on his having placed his mouth on the victim's vagina (720 ILCS 5/12-13(a)(1) (West 2006)), two counts of aggravated criminal sexual abuse based on his having caused bodily harm to the victim (720 ILCS 5/12-16(a)(2) (West 2006)), and two counts of aggravated criminal sexual abuse based on his having endangered the life of the victim (720 ILCS 5/12-16(a)(5) (West 2006)).

¶ 5 On March 31, 2009, the State amended the indictment to add one count of home invasion based on defendant's having injured the victim (720 ILCS 5/12-11(a)(2) (West 2006)), five counts of aggravated criminal sexual assault based on the use or threatened use of force (720 ILCS 5/12-14(a)(3) (West 2006)), five counts of aggravated criminal sexual assault based on his having used or threatened force during a home invasion (720 ILCS 5/12-14(a)(4) (West 2006)), two counts of home invasion based on his having criminally sexually assaulted or abused the victim in her dwelling place (720 ILCS 5/12-11(a)(6) (West 2006)), five counts of criminal

sexual assault (720 ILCS 5/12-13(a)(1) (West 2006)), and one count of criminal sexual abuse (720 ILCS 5/12-15(a)(1) (West 2006)).

¶ 6 Previously, on September 5, 2007, defendant filed a motion to suppress DNA evidence obtained from a toothbrush issued to defendant while he was a pretrial detainee in the Jefferson County jail on an unrelated charge. The State responded that defendant had no reasonable expectation of privacy in his jail cell, that, even if he did, he had no privacy in the jail-issued toothbrush, and that the DNA would have been discovered inevitably. Following a hearing, the trial court denied the motion to suppress. It did so because defendant had no reasonable expectation of privacy and, even if he did, there was reasonable suspicion to seize the toothbrush.

¶ 7 At a September 10, 2008, status hearing, defendant sought a continuance so that he could locate his cousin, Portia Douglas, a witness material to his filing a second motion to suppress. According to defendant's attorney, he had been trying to locate Douglas for about a month. The trial court stated that, because counsel had had almost 22 months to find Douglas, it would give him "one last date." Counsel explained that Douglas's address had changed. The court gave defendant 30 days and set the matter for October 8, 2008.

¶ 8 On October 8, 2008, defendant filed a second motion to suppress. He asserted therein that the arrest that led to his being held in the Jefferson County jail was unlawful because it was tainted by the unlawful warrantless search of Douglas's home, in which he was found and arrested. The State responded that the search was justified by consent and/or exigent circumstances. The State expressly reserved the right to argue alternatively that the unlawfulness of the search was attenuated under the independent-source or inevitable-discovery doctrine as it related to the DNA evidence.

¶ 9 The only witnesses to testify at the hearing were defendant and one of the officers who searched the home. The officer testified that a black female consented to the search.

¶ 10 In denying the motion to suppress, the trial court found that the police had valid consent when they entered the home to search for defendant.

¶ 11 On January 13, 2009, defendant filed, *pro se*, a motion claiming ineffective assistance of counsel. He based the motion, in part, on his attorney's having refused to call Douglas to testify at the October 8, 2008, suppression hearing.

¶ 12 At the January 16, 2009, hearing on that motion, defendant's attorney stated that he did not refuse to call Douglas. Instead, he did not call her because he had been unable to locate her or obtain her statement. Because the court had wanted to move the case to trial, and had given him only a month more to find her, he opted to proceed on the motion to suppress without her. He explained that he had received information from defendant and defendant's father, which included phone numbers and addresses for Douglas. At one point, he had information that she was in a battered-women's shelter in Chicago. He was not certain, however, whether she was even within the state. On one occasion, an investigator called one of the numbers and left a voicemail message for Douglas, but the message was not returned. According to counsel, he investigated "everything [he] could." He did not send an investigator to Mt. Vernon (Jefferson County), however, because he was not certain that she was even there.

¶ 13 In denying the motion, the trial court found that counsel had done "all he could" in trying to locate Douglas. The court found that counsel represented defendant "very effectively."

¶ 14 On January 16, 2009, defendant filed a motion to reopen the proofs related to his second motion to suppress. Attached to the motion was an investigator's report. According to the

report, on December 22, 2008, the investigator spoke by phone with Douglas, who was in Mt. Vernon. The investigator's report summarized that conversation.

¶ 15 Douglas told the investigator that defendant had been visiting her home in Mt. Vernon. While defendant was on a walk, she called the police regarding recent vandalism by several teenage boys. A short time later, the police arrived and asked her if there were any African-American men in the house. After telling the police that the only male in the house was her Caucasian fiancé, she closed the door and went to get her fiancé, who was sleeping upstairs. When she came back downstairs, there were two or three officers in her living room. They went into the kitchen, found defendant, and arrested him. She did not invite the officers into, or give them permission to search, the house.

¶ 16 At the hearing on the motion to reopen the proofs, defense counsel reiterated that he had tried unsuccessfully several times to locate Douglas and therefore proceeded at the hearing without her. To counsel's surprise, a few weeks after the hearing, defendant told him that Douglas had been located. Counsel obtained her statement and contended that she could offer relevant testimony on the issue of consent to search her house. The State responded, among other things, that, even if the search was unlawful, any illegality was attenuated because the police would have eventually found defendant, arrested him, and obtained his DNA. The trial court, in denying the motion to reopen the proofs, ruled that, in light of the proffer regarding Douglas's statement, the ruling on the motion to suppress would not have changed.

¶ 17 On November 30, 2009, defendant entered a negotiated guilty plea to one count of aggravated criminal sexual assault, a Class X felony. See 720 ILCS 5/12-14(d0(1) (West 2006). The remaining counts were nol-prossed. The plea agreement provided that defendant would be sentenced to 15 years' imprisonment.

¶ 18 The factual basis for defendant's guilty plea established that, on October 9, 2006, the victim was sexually assaulted in her apartment in Downers Grove. The victim described her assailant as a black male, about 5'10," in his middle 20s, with close-cut hair, medium skin tone, and a thin, muscular build.

¶ 19 An anonymous caller identified the assailant as Larry Rason Barrett. The investigation revealed that there was only one person by that name in Illinois. His last known address was less than one mile from the pay phone used to make the anonymous call. The police obtained a description that defendant was 21 years old, was 5'10," and weighed 165 pounds.

¶ 20 The police were unable to locate defendant. They eventually learned that he had been arrested on a charge of criminal damage to state-supported property and was being held in the Jefferson County jail.

¶ 21 A Downers Grove investigator asked the jailers to ask defendant for a voluntary DNA sample, but defendant refused. The investigator then asked if the jailers would take defendant's jail-issued toothbrush and razor for the purpose of obtaining his DNA. The jailers did so.

¶ 22 On December 6, 2006, the investigator interviewed defendant at the Jefferson County jail. During that interview, defendant admitted that he was at the victim's apartment complex on the date of the sexual assault. He also provided other incriminating information.

¶ 23 The police obtained a shoe print from the victim's apartment door. The sole of the shoes that defendant was wearing when he was arrested in Jefferson County appeared to match the shoe print on the door.

¶ 24 On December 15, 2006, the police learned that there was a preliminary match between the DNA on defendant's toothbrush and that left on the victim. The police then obtained a

search warrant for defendant's DNA. Defendant provided a DNA sample that matched the DNA taken from the victim.

¶ 25 On December 16, 2006, the police again interviewed defendant at the Jefferson County jail. Defendant indicated that he knew the name of the victim's apartment complex. He admitted that on the date of the attack he had been at a party on the same floor as the victim's apartment and that he had been wearing the shoes that matched the print on the victim's door. Defendant conceded that it was possible that he had accidently entered the victim's apartment but could not remember doing so, because someone had put something in his drink.

¶ 26 After accepting the guilty plea, the trial court sentenced defendant to 15 years in prison. Defendant did not file a motion to withdraw his guilty plea, any postsentencing motions, or a direct appeal.

¶ 27 On December 5, 2012, defendant filed a *pro se* postconviction petition, alleging the following claims of ineffective assistance of trial counsel: (1) counsel erroneously advised him that despite his negotiated guilty plea he could challenge the denials of his pretrial motions; (2) counsel failed to advise him that he could preserve any challenge to the denials of his pretrial motions only by proceeding with a stipulated bench trial; (3) counsel failed to call Douglas as a witness to impeach the officer's testimony at the second suppression hearing that Douglas consented to a search of her house; (4) counsel erroneously advised defendant that the second motion to suppress would be granted without Douglas's testimony and, after it was not, that he could reopen the proofs to allow Douglas to testify; (5) counsel failed to properly litigate the first motion to suppress; (6) counsel misled defendant into believing that counsel could impeach the victim at a trial; (7) counsel failed to file a motion to dismiss on speedy-trial grounds; and (8) counsel failed to review all of the evidence with defendant.

¶ 28 The only affidavit attached to the postconviction petition was defendant's. It stated that defendant had failed to obtain the affidavits of his trial attorney and Douglas because he lacked the resources to do so and was incarcerated.

¶ 29 On January 18, 2013, the trial court summarily dismissed the postconviction petition. Defendant filed a timely appeal.

¶ 30 II. ANALYSIS

¶ 31 On appeal, defendant contends that he raised the gist of a claim that his trial counsel was ineffective. In that regard, he asserts that his counsel failed to adequately explain to him that, by pleading guilty, he would not preserve any issues related to the denials of his motions to suppress. Related to that contention, defendant argues that counsel was ineffective for not proceeding with a stipulated bench trial so that those issues would be preserved. He also contends that he was not required to attach the affidavit of Douglas or his counsel, because there is factual support in the record for his claims.

¶ 32 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)) establishes a three-stage process for adjudicating a postconviction petition. *People v. Carballido*, 2011 IL App (2d) 090340, ¶ 37 (citing *People v. Jones*, 213 Ill. 2d 498, 503 (2004)). At the first stage, the trial court must review the petition within 90 days of its filing and decide whether it is either frivolous or patently without merit. *Carballido*, 2011 IL App (2d) 090340, ¶ 37. If the court decides that it is either, it must dismiss the petition in a written order. *Carballido*, 2011 IL App (2d) 090340, ¶ 37.

¶ 33 A *pro se* postconviction petition is frivolous or patently without merit when it has no arguable basis either in law or in fact. *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). A petition has no basis in law when it is based on an indisputably meritless legal theory. *Hodges*, 234 Ill. 2d at

16. That means that the legal theory is completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16. A petition has no factual basis when it is based on factual allegations that are either fantastic or delusional. *Hodges*, 234 Ill. 2d at 17.

¶ 34 Although the postconviction petition must identify the bases upon which the defendant's constitutional rights were violated, the threshold for first-stage survival is low. *Hodges*, 234 Ill. 2d at 9. The defendant must set forth only the gist of a constitutional claim, which means that the petition contains enough facts to make out an arguably constitutional claim. *Hodges*, 234 Ill. 2d at 9. A court must dismiss the petition when the record contradicts the defendant's allegations. *People v. Rogers*, 197 Ill. 2d 216, 222 (2001). We review *de novo* a trial court's first-stage dismissal. *Hodges*, 234 Ill. 2d at 9.

¶ 35 A claim of ineffective assistance of counsel is assessed under the standards articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Brown*, 236 Ill. 2d 175, 185 (2010). Under the Act, the trial court may not summarily dismiss a petition alleging ineffective assistance of counsel if: (1) counsel's performance arguably fell below an objective standard of reasonableness and (2) the defendant was arguably prejudiced as a result. *Brown*, 236 Ill. 2d at 185. The failure to establish either prong of *Strickland* is fatal to the claim. *People v. Clendenin*, 238 Ill. 2d 302, 317-18 (2010). If it is easier to dispose of such a claim on the basis that it lacks sufficient prejudice, then the court may proceed directly to the second prong and need not address whether counsel's performance was deficient. *People v. Givens*, 237 Ill. 2d 311, 331 (2010). With respect to a motion to suppress, a defendant meets the prejudice prong by showing a reasonable probability that, had counsel not committed the alleged error, the motion to suppress would have been granted and the outcome of the proceedings would have been different. See *Givens*, 237 Ill. 2d at 331.

¶ 36 In the present case, defendant claims that, had his trial counsel advised him that he needed to proceed with a stipulated bench trial to preserve his right to challenge on direct appeal the denials of his motions to suppress, he would have been taken that course. As discussed, we may dispose of those claims of ineffectiveness based on the prejudice prong of *Strickland*.

¶ 37 Before addressing the question of prejudice, we must address an issue raised by defendant for the first time at oral argument. Defendant contended during oral argument that prejudice must be presumed, because he was effectively denied any appeal when his trial counsel, by failing to pursue a stipulated bench trial, did not preserve an appellate challenge to the denials of his motions to suppress.

¶ 38 Defendant, however, forfeited that argument because he failed to raise it in his opening brief. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). Indeed, defendant took an inconsistent position in his opening brief, where he argued that he had an "arguable basis that he was prejudiced by counsel's erroneous advice" because there was an "arguably meritorious basis to pursue his motion[s] to quash and suppress." Based on that contention, the State was certainly lulled into thinking that he was not pressing the argument he later raised at oral argument. Consequently, the State had no meaningful opportunity to respond. Further, defendant did not even raise the argument in his reply brief, even though the case relied on by defendant at oral argument, *People v. Cunningham*, 286 Ill. App. 3d 346 (1997), was cited by the State in its brief, albeit for unrelated propositions. Based on the foregoing, defendant clearly forfeited the argument that prejudice must be presumed in this case.

¶ 39 Nonetheless, even if we were to consider that argument on its merits, defendant would not prevail. As noted, the sole case relied on by defendant is *Cunningham*. We decline to follow that case for several reasons.

¶ 40 First, *Cunningham* is factually distinguishable from our case. In *Cunningham*, trial counsel essentially promised the defendant that, notwithstanding the guilty plea, he could appeal the denial of his motion to suppress. *Cunningham*, 286 Ill. App. 3d at 351. Therefore, in that case the guilty plea was induced, in part, by that unfulfilled promise. *Cunningham*, 286 Ill. App. 3d at 351. Here, on the other hand, the record does not indicate any promise or other affirmative assertion by trial counsel that suggested that an appeal could be taken even if defendant entered into the negotiated guilty plea. Moreover, in his postconviction petition, defendant did not allege that counsel made any such assertion or promise. Thus, an essential fact in *Cunningham* is not present here and, therefore, the cases are distinguishable.

¶ 41 Second, we respectfully disagree with the decision and reasoning of *Cunningham* regarding prejudice. In holding that prejudice was presumed, the court relied heavily on *People v. Moore*, 133 Ill. 2d 331 (1990). Its reliance on *Moore*, however, was misplaced, because in *Moore* the issue was whether appellate counsel was ineffective when he failed to comply with certain appellate court rules, which resulted in the entire appeal being dismissed. The court in *Moore* held that in such a situation prejudice was presumed because the defendant's appellate counsel effectively failed to perfect an appeal. *Moore*, 133 Ill. 2d at 339. Here, as in *Cunningham*, counsel's failure to preserve a challenge to the denials of the motions to suppress did not preclude an appeal altogether. Rather, it merely acted as a waiver of that particular issue.

¶ 42 Such a conclusion is further supported by *Penson v. Ohio*, 488 U.S. 75 (1988), a case relied on by *Moore*. The *Penson* Court held that, where a defendant is effectively denied counsel on appeal, prejudice is presumed. *Penson*, 488 U.S. at 88. In so holding, the Court emphasized that that situation is different from a case where counsel fails to press a particular argument on appeal. *Penson*, 488 U.S. at 88. The same reasoning holds true in *Cunningham* and in our case,

where counsel's asserted ineffectiveness did not result in the loss of an appeal altogether. Thus, we respectfully do not consider *Cunningham* to be persuasive support for defendant's argument that prejudice must be presumed.

¶ 43 Third, *Cunningham* is not binding precedent on this court. We are not obliged to follow the decisions from another district or even our own. See *People v. Smith*, 2013 IL App (2d) 121164, ¶ 7.

¶ 44 Finally, defendant does not cite, and we have not found, any other case that has followed *Cunningham* or has held similarly. Therefore, *Cunningham* stands alone in its holding, and we decline to apply it in this case. Thus, notwithstanding the forfeiture, we would reject defendant's argument that he need not establish prejudice because such prejudice must be presumed.

¶ 45 We will now address the prejudice issue as to each of the motions to suppress. To establish prejudice in this case, defendant must show that he would have at least arguably prevailed on direct appeal had he been able to challenge the denial of either of his motions to suppress. See *Hodges*, 234 Ill. 2d at 14.

¶ 46 Defendant contends that he arguably would have prevailed on appeal as to the denial of his motion to suppress the DNA found on his jail-issued toothbrush. In that regard, he argues that the issue of whether, as a pretrial detainee, he had an expectation of privacy in his personal effects kept in his cell, although one of first impression in Illinois, was one upon which he could arguably have prevailed.

¶ 47 Our research indicates that no Illinois court has definitively ruled on whether a pretrial detainee retains a reasonable expectation of privacy in his personal effects in his jail cell. However, the issue is clearly a nonstarter.

¶ 48 The United States Supreme Court has held that a pretrial detainee generally has no expectation of privacy in his jail cell. *Bell v. Wolfish*, 441 U.S. 520, 546 (1979). A pretrial detainee has the same diminished expectation of privacy as that of a convicted inmate. *Cherry v. Litscher*, No. 02-C-71-C, 2002 WL 32350051, at *12 (W.D. Wis. Apr. 1, 2002) (citing *Hudson v. Palmer*, 468 U.S. 517 (1984), and *Bell*, 441 U.S. at 546). For example, a pretrial detainee has no reasonable expectation of privacy in his conversations within his cell. *People v. Clark*, 125 Ill. App. 3d 608, 611-12 (1984) (citing *Lanza v. New York*, 370 U.S. 139, 143-44 (1962)). Thus, it is not arguable that defendant would have prevailed on appeal had he been able to raise that issue.

¶ 49 Moreover, a United States District Court has ruled that neither the search of defendant's cell nor the seizure of the toothbrush violated the Fourth Amendment. See *Barrett v. Pollard*, No. 08-cv-518-PMF, 2009 WL 1309040 (S.D. Ill. May 8, 2009).[1] In so ruling, the district court noted that pretrial detainees generally have no legitimate expectation of privacy in their cells. *Barrett*, 2009 WL 1309040, at *2 (citing *Hudson*, 468 U.S. at 526, and *Bell*, 441 U.S. at 557). The district court also ruled that the toothbrush was jointly possessed by defendant and the jail and thus could be seized without violating the Fourth Amendment. *Barrett*, 2009 WL 1309040, at *2 (citing *United States v. Matlock*, 415 U.S 164, 171 & n.7 (1974)).

¶ 50 Based on the foregoing authority, it is evident that defendant would not have arguably prevailed on an appeal challenging the denial of his motion to suppress the DNA gathered from his jail-issued toothbrush. Therefore, he suffered no prejudice under *Strickland* from his trial counsel's failure to preserve the issue for appeal, and he did not state the gist of a constitutional claim of ineffective assistance of counsel in that regard.

[1] Curiously, neither party cited this case to this court.

¶ 51 As to the denial of his second motion to suppress, defendant contends that he would have argued on direct appeal that his counsel was ineffective for failing at the suppression hearing to offer Douglas's testimony regarding her lack of consent to search her home. That claim fails, for several reasons.

¶ 52 First, trial counsel was not ineffective, because, even after a stipulated bench trial, defendant would not have been able to raise an issue of ineffectiveness regarding the failure to call Douglas as a witness. That is so because that issue depended, in part, on the nature of Douglas's potential testimony. Of course, Douglas's proposed testimony would not have been in the record on direct appeal. Therefore, that issue could not have been resolved on appeal. See *People v. Burns*, 304 Ill. App. 3d 1, 11 (1999); *People v. Jones*, 168 Ill. App. 3d 925, 937 (1988). Thus, defendant suffered no prejudice from counsel's failure to preserve that issue for appeal.

¶ 53 Second, even if the issue could have been raised on direct appeal, any contention that counsel was ineffective for failing to secure Douglas's testimony would not arguably have succeeded. As counsel explained at the hearing on defendant's motion claiming ineffective assistance of counsel, he tried "everything [he] could" to find Douglas before the hearing on the motion to suppress. In that regard, he stated that he obtained from defendant and his father phone numbers and addresses for Douglas but was unable to locate her. That seems quite reasonable, as it is apparent that Douglas was difficult to locate. That is borne out by the fact that at one point she was possibly in a shelter in Chicago but counsel was not sure if she was even in the state. Apparently, neither defendant nor his father was successful at locating her either. Defendant asserts that his attorney stated that an investigator called only one of the phone numbers for Douglas. That misinterprets what counsel stated. A more reasonable interpretation

is that the investigator, in calling one of the numbers, reached a voicemail. This does not mean that he did not try calling the other numbers.

¶ 54 Moreover, the trial court found that trial counsel did "all he could" to locate Douglas and that he was "very effective" in that regard. There is nothing in the record to dispute that conclusion. Therefore, any challenge on appeal to trial counsel's effectiveness in seeking to obtain Douglas's testimony would not have arguably succeeded.

¶ 55 Because defendant would not have arguably prevailed on appeal regarding trial counsel's alleged ineffectiveness for failing to call Douglas as a witness, there was no prejudice from counsel's failure to preserve that issue. Therefore, defendant failed to state the gist of a constitutional claim in that regard, and the trial court properly dismissed that claim.

¶ 56 Because the record reflects that any challenge on direct appeal to the denial of either of defendant's motions to suppress would not have arguably succeeded, trial counsel was not ineffective for failing to preserve those issues either by advising defendant of the need to proceed with a stipulated bench trial or by pursuing one. Therefore, defendant did not allege the gist of a constitutional claim in either respect, and the court properly dismissed the postconviction petition at the first stage.

¶ 57 III. CONCLUSION

¶ 58 For the reasons stated, we affirm the first-stage dismissal of defendant's postconviction petition.

¶ 59 Affirmed.