2015 IL App (2d) 141185-U
No. 2-14-1185
Order filed October 26, 2015

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. GUILLERMO D. COIX, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 11-CF-2216 Honorable Blanche Hill Fawell, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed defendant's postconviction petition, which alleged that he was denied due process and effective assistance of counsel: as the substance that defendant delivered contained (some amount of) morphine, defendant was properly convicted of delivering a substance containing morphine, regardless of the extent to which the substance also contained (legal or illegal) opium poppy.

¶ 2 Defendant, Guillermo D. Coix, appeals the trial court's dismissal of his petition filed under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2012)) in connection with his conviction of unlawful delivery of 10 to 15 grams of a substance containing morphine (720 ILCS 570/401(c)(3) (West 2010)), a Class 1 felony, after he sold a substance that the parties

alternately refer to as opium straws, poppy straws, or poppy pods (opium straws) containing morphine to an undercover officer. He contends that the existence of a separate Class 2 felony for delivery of opium poppy precluded a charge of the Class 1 felony for delivering a substance containing morphine, resulting in a denial of due process and effective assistance of counsel when he was allowed to plead guilty without a determination of whether the opium straws contained opium poppy. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Before proceeding, we address the State's request to review inaccuracies in defendant's brief and to disregard portions of defendant's brief as a result of these inaccuracies. According to the State, defendant's "Statement of Facts" section is "rife with argument and inaccuracies." Illinois Supreme Court Rule 341 (eff. Feb. 6, 2013) sets forth the requirements for briefs on appeal, and defendant's brief fails to comply with that rule with respect to the facts section. "The rules of procedure concerning appellate briefs are not mere suggestions, and it is within this court's discretion to strike the [defendant's] brief for failing to comply with Supreme Court Rule 341." *Crull v. Sriratana*, 388 Ill. App. 3d 1036, 1045 (2009). Although the court has discretion to strike an appellate brief (*People v. Thomas*, 364 Ill. App. 3d 91, 97 (2006)), we will not generally strike portions of a party's brief unless it includes such flagrant improprieties that it hinders our review of the issues. *Id.* Our review of defendant's statement of facts and the record indicates that it contains impermissible argument; however, they do not hinder our review of the case. Accordingly, we will disregard any inappropriate or argumentative statements.

¶ 5 On September 21, 2011, defendant was arrested and charged with unlawful delivery of 400 to 900 grams of a substance containing morphine, a Class X felony (720 ILCS 570/401 (a)(1)(C) (West 2010)). It is undisputed that defendant sold opium straws to an undercover

officer. Defendant later confessed to selling opium to the officer. The opium straws were sent to a crime laboratory. The laboratory described the opium straws as tan plant-material capsules containing 404 grams of a morphine and codeine mixture. The seeds from the material were not tested. The report stated that morphine and codeine were reported in literature as being alkaloids found in the plant *papaver somniferum L* (p. somniferum), also referred to as opium poppy. Notes of correspondence attached to the report showed that the analyst spoke to the Assistant State's Attorney and stated that she could identify morphine and codeine. However, she added that there are actually two species of poppy that contain morphine, p. somniferum and wild poppy, and that she could not identify the plant material as p. somniferum. In another correspondence, the analyst stated that she told the Assistant State's Attorney that she could not identify the evidence as opium, as that would require a botanist.

¶ 6 On May 10, 2012, as part of a plea agreement, defendant pleaded guilty to an amended charge of delivery of 10 to 15 grams of a substance containing morphine, a Class 1 felony (720 ILCS 570/401(c)(3) (West 2010)), in exchange for a sentence of probation. A misdemeanor charge of endangering the life of a child was dismissed. The factual basis stated that defendant sold opium straws to an undercover officer and that the crime laboratory determined that the opium straws contained 10 grams or more but less than 15 grams of a substance containing morphine. The court accepted the plea and sentenced defendant in accordance with the agreement.

¶ 7 On May 5, 2014, defendant filed a postconviction petition alleging that he was denied due process and effective assistance of counsel because the opium straws were never submitted to a botanist for examination. He argued that, had the opium straws been analyzed, either they would have been found to be opium poppy from p. somniferum, a narcotic drug subjecting him

to at most a Class 2 felony (720 ILCS 570/401(d) (West 2010)), or they would have been found have come from some other form of poppy that defendant contended would be lawful to possess.

¶ 8 Defendant attached to his petition the affidavit of plant scientist Patrick S. Herendeen, who averred that there are multiple species of poppy in addition to p. somniferum. Morphine and codeine occur in other species, but in lesser quantities. In addition, there are a number of hybrids that can contain lesser amounts. He averred that, because the crime lab did not quantify the amounts of morphine and codeine in the opium straws, it was not possible to verify the species of poppy. The trial court advanced the petition to stage-two proceedings, the State moved to dismiss, and a hearing was held.

¶ 9 At the hearing, the State addressed defendant's argument, stating that defendant was not charged with delivering opium poppy. Instead, he was charged with the separate and distinct offense of delivery of a substance containing morphine. The State argued that, because defendant did indeed deliver a substance that contained morphine, the charge was appropriate. The trial court granted the motion to dismiss, and defendant appeals.

¶ 10 II. ANALYSIS

¶ 11 Relying primarily on the definition section of the Illinois Controlled Substances Act (the Act) (720 ILCS 570/102(ee) (West 2010)), defendant contends that, because the Act defines "opium poppy" as a narcotic drug from the plant p. somniferum, and provides that delivering opium poppy is a Class 2 felony, it precludes a charge of a higher-class felony for delivering a substance containing morphine. Thus, he argues that, had a botanist analyzed the substance and found that it was from p. somniferum, he could have been convicted of nothing worse than a Class 2 felony for delivery of that drug. Accordingly, he argues that he was denied due process and that his counsel was ineffective for failing to investigate the form of poppy involved. The

State contends that defendant was not charged with delivery of opium poppy and instead was charged with delivery of a substance containing morphine, which, under the plain language of the Act, was a proper charge.

¶ 12 The Post-Conviction Act provides a three-stage mechanism for a defendant who alleges a substantial deprivation of his or her constitutional rights at trial. At the first stage, the trial court must independently review the petition within 90 days of its filing and determine whether it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2012). If the petition survives initial review, the process moves to the second stage, where the trial court appoints counsel for the defendant, if necessary (725 ILCS 5/122-4 (West 2012)), and the State may file a motion to dismiss or an answer (725 ILCS 5/122-5 (West 2012)).

¶ 13 At the second stage of the proceedings, "[i]f the State moves to dismiss, the trial court may hold a dismissal hearing, which is still part of the second stage." *People v. Wheeler*, 392 Ill. App. 3d 303, 308 (2009) (citing *People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998)). At this stage, to survive dismissal, the petition must make a substantial showing of a constitutional violation. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). The propriety of a dismissal at the second stage is a question of law, which we review *de novo*. *People v. Simpson*, 204 Ill. 2d 536, 547 (2001).

¶ 14 In reviewing a claim of ineffective assistance of counsel, we apply the two-part test established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). "To prevail under *Strickland*, a defendant must show that his attorney's assistance was both deficient and prejudicial." *People v. Curry*, 178 Ill. 2d 509, 518-19 (1997). "More precisely, a defendant must show [(1)] that his attorney's assistance was objectively unreasonable under prevailing professional norms, and [(2)] that there is a 'reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Id.* at 519 (quoting *Strickland*, 466 U.S. at 687). The failure of a defendant to satisfy either the deficiency prong or the prejudice prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 76.

¶ 15 Under section 401 of the Act, it is unlawful for any person to knowingly deliver a controlled substance. 720 ILCS 570/401 (West 2010). A controlled substance is defined as any drug or substance included in schedules in the Act. 720 ILCS 570/102(f) (West 2010). Opium and opiates, including morphine, are controlled substances included in Schedule II of the Act. 720 ILCS 570/206(b)(1)(xiii) (West 2010).

¶ 16 The Act provides graduated penalty provisions based on the amount of the substance. Any person who delivers 400 grams or more but less than 900 grams of a substance containing morphine is guilty of a Class X felony. 720 ILCS 570/401(a)(1)(C) (West 2010). Any person who delivers 10 grams or more but less than 15 grams of a substance containing morphine is guilty of a Class 1 felony. 720 ILCS 570/401(c)(3) (West 2010). Any person who delivers any other amount of a controlled substance that is a narcotic drug is guilty of a Class 2 felony. (720 ILCS 570/401(d) (West 2010). Opium poppy and poppy straw are included in the list of narcotic drugs. 720 ILCS 570/102 (aa)(3) (West 2010). Opium poppy is defined as the plant of the species p. somniferum. 720 ILCS 570/102(ee) (West 2010).

¶ 17 The classification system and graduated penalty provisions of the Act and similar statutes have been held constitutional and do not violate due process or equal protection merely because they are based on the amount of the substance containing the controlled substance rather than on the pure amount of the drug involved. See *People v. Mayberry*, 63 Ill. 2d 1, 10 (1976); *People v. Yettke*, 95 Ill. App. 3d 365, 369 (1981). In *Mayberry*, our supreme court specifically stated that

the legislature may have believed that any given amount of a drug can be distributed to more people, and thus have more potential to be harmful, if mixed with another substance. Further, there was no demonstration that a classification scheme based on the amount of the pure drug contained in a given substance would be feasible. Thus, the court held that there is a reasonable basis for the classification scheme and graduated penalties. *Mayberry*, 63 Ill. 2d at 9.

¶ 18 Defendant does not argue that the statutory scheme is unconstitutional but instead contends that, based on the separate provision that delivery of opium poppy as a narcotic drug is a Class 2 felony, it violated due process and effective assistance to allow him to plead guilty the Class 1 felony of delivery of a substance containing morphine. However, we have previously rejected such an argument.

¶ 19 In *People v. Bradi*, 107 Ill. App. 3d 594, 603 (1982), which neither party cites, the defendant was found guilty of Class 1 felony possession of more than 30 grams of a substance containing cocaine. The defendant contended that the graduated penalty provisions were unconstitutional. In the alternative, he argued that the Act should be construed as prohibiting possession of 30 grams or more of cocaine, instead of 30 grams or more of a " 'substance containing cocaine.' " *Id*. at 602. Cocaine is a narcotic drug under the Act. 720 ILCS 570/102(aa)(4) (West 2010). Applying *Mayberry*, we found the graduated penalty provision constitutional. Then, applying the rationale from *Mayberry*, we held that it was clear that the legislature was concerned with the quantity of the mixed substance possessed, not the quality. *Id*. at 603. Accordingly, we rejected the defendant's argument.

¶ 20 Here, the same rationale applies. The Act provides for a graduated penalty system that allows for a conviction of a Class 1 felony for delivering 15 to 30 grams of a substance containing morphine. That is not changed if the actual amount of morphine in the substance is

minimal. Under both *Bradi* and the plain language of the Act, defendant could be charged with the Class 1 felony because he did indeed deliver a substance containing morphine. As we noted in *Bradi*, we must accede to the intent of the legislature on this matter. *Id.*

¶ 21 Defendant also asserts that, if the substance were tested and found not to be from the species p. somniferum, he could not be found guilty at all. But the substance was tested and found to contain morphine, which is proscribed by the Act. Because it was proper to charge defendant with delivery of a substance containing morphine, his argument on this point fails. Likewise, because the charge was proper, defendant was not denied due process or effective assistance when he was allowed to plead guilty.

¶ 22 III. CONCLUSION

¶ 23 Defendant was not denied due process or effective assistance of counsel. Accordingly, the judgment of the circuit court of Du Page County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 24 Affirmed.