2013 IL App (3d) 110640-U

Order filed June 10, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Circuit Court) of the 13th Judicial Circuit,) La Salle County, Illinois,
Plaintiff-Appellee,	)
	) Appeal No. 3-11-0640
v.	) Circuit No. 08-CF-213
	)
CALVIN MERRITTE,	) Honorable) H. Chris Ryan,
Defendant-Appellant.	) Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Carter and Holdridge concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court properly dismissed defendant's postconviction petition that failed to allege the gist of an ineffective assistance of counsel claim.

¶ 2 Following a bench trial, defendant was found guilty of criminal drug conspiracy and unlawful possession of a controlled substance with intent to deliver. Defendant was sentenced to 20 years' imprisonment on the conspiracy charge. Defendant appealed, and we affirmed his conviction and sentence. *People v. Merritte*, No. 3-08-0785 (2010) (unpublished order under Supreme Court Rule

23). Defendant then filed a postconviction petition, alleging ineffective assistance of both his trial and appellate counsel. The trial court dismissed defendant's postconviction petition. We affirm.

¶ 3 In April 2008, defendant Calvin Merritte was charged with one count of criminal drug conspiracy and five counts of possession of a controlled substance with intent to deliver. The indictment for conspiracy alleged that defendant, Clarence Merritte (defendant's brother), Paul Forbes (defendant's step-brother), and Joy Forbes (defendant's mother), were part of a group called "Da Hittaz" that (1) agreed to commit unlawful possession of controlled substances containing heroin and/or cocaine, (2) engaged in the distribution of cocaine and heroin in La Salle County, (3) used females, a/k/a "trappers," to transport heroin and cocaine from Chicago to La Salle County and to distribute the cocaine and heroin throughout La Salle County. The conspiracy count further alleged that defendant "organized, directed, managed, controlled and supervised a heroin and cocaine distribution operation that sold heroin and cocaine in La Salle county."

¶ 4 In June 2008, defendant, Calvin Merritte, Paul Forbes and Joy Forbes were jointly tried in a bench trial. At trial, Rachel Milby testified that she contacted defendant to purchase heroin on several occasions. Milby also worked as a driver for defendant several times and was paid in heroin. She went with defendant a couple of times from Ottawa to Chicago to Joy Forbes' home. On one of those trips, Milby and defendant placed crack cocaine in plastic baggies in a bedroom of Joy Forbes' house.

¶ 5 Milby was arrested in January 2007 for possession of a controlled substance with intent to deliver after police officers found 18 bags of heroin in the van she was driving. Defendant was a passenger in the van.

¶ 6 Lindsay Lavalle testified that she has known defendant for two years. She bought drugs from

him directly approximately 20 times. For approximately three weeks, she worked for defendant, holding and selling drugs. She also drove for defendant in exchange for heroin.

¶ 7 Dierdre Sinkler testified she knew about "Da Hittaz" because defendant and Clarence Merritte talked about the group. She understood that the organization sold drugs. Defendant and Clarence Merritte gave Sinkler heroin in exchange for her assistance in packaging and transporting heroin and cocaine for them.

¶ 8 Rendelle Farrell testified that she met defendant in the summer of 2006. Defendant offered to give Farrell and her boyfriend heroin at Farrell's apartment. A few days later, defendant returned and asked Farrell and her boyfriend to give him a ride to Chicago. Farrell's boyfriend drove defendant to Joy Forbes' house, and Farrell rode along. At Joy Forbes' house, Farrell saw "a bunch" of tins of heroin in the kitchen. Defendant gave her heroin to use while she was there. Farrell bought drugs from defendant one time. In July 2007, Farrell, Paul Forbes and Brooke Henry rode in a car driven by defendant to pick up drugs in Lymon's Mound.

¶ 9 Brooke Henry testified that she rode in a car with defendant, Paul Forbes and Farrell to pick up heroin in July 2007 in Lymon's Mound. Henry put the drugs in her pants. Paul Forbes was supposed to pay her for holding the drugs. When she sold drugs for Paul Forbes, she gave the money to Forbes, and Forbes gave it to defendant. She is familiar with "Da Hittaz" and believes that defendant is the leader of that group.

¶ 10 Darnell Smith testified that he is a member of "Da Hittaz." As a member of that group, he sold crack cocaine. He testified that defendant is a member of "Da Hittaz."

¶ 11 Tara Morgan testified that she began having a sexual relationship with defendant in February 2007. During that time, she was addicted to heroin and received it from defendant. Defendant told

her he was a member of "Da Hittaz" and asked if she wanted to hold drugs and drive for him. She did both for about a month. She went with defendant to his mother's house in Chicago two or three times. On one occasion, defendant and his younger brother were bagging up crack cocaine. Defendant gave her the bags to put in her pants until they arrived in Ottawa. When she got to Ottawa, she sold the drugs.

¶ 12 Morgan saw defendant tell people to sell crack cocaine and heroin for him. She saw people hand defendant money they earned from selling drugs. Defendant did not have a legitimate job. He made his money by drug dealing. She described defendant as "the boss." She never saw anyone tell defendant what to do. On one occasion, drugs that defendant gave Morgan to "hold" for him became lodged in her vaginal cavity. Defendant retrieved the drugs. A videotape was taken of that incident, which the State introduced as evidence at the trial.

¶ 13 William Bradley, the owner of Skin Scribe Tattoo shop in Ottawa, testified that he gave members of a group called "Da Hittaz" tattoos in exchange for drugs. Bradley also bought drugs from the group. Bradley thought that defendant was the leader of "Da Hittaz." Other members of the group included Paul Forbes and Clarence Merritte. He perceived that "Da Hittaz" was a group of drug dealers. He never knew defendant to have a legal job.

¶ 14 Bradley allowed "Da Hittaz" to sell drugs out of his shop. He estimated that he witnessed 100 drug sales in his shop. Defendant did not sell the drugs himself but directed females to do so. He has seen defendant with up to $2,000 in cash.

¶ 15 Officer James Girton of the La Salle police department testified that he executed a search warrant at the home of Joy Forbes in December 2007. Joy Forbes was present at the home. According to Girton, Forbes said that she was familiar with "Da Hittaz" and said it was "their group

down in Ottawa." She said that the group sold drugs and identified defendant as the leader of the group. She said that she pays for her house from money she receives from her "kids," including defendant. She said that defendant gets his money from "the boys in Ottawa," which meant "Da Hittaz." She said that "the boys" make money from selling drugs in Ottawa. The police found plastic baggies and a digital scale with drug residue in a bedroom of Forbes' house. Forbes said defendant used that bedroom when he stayed at her home.

¶ 16 Brittany Vasquez testified that she told defendant she wanted to buy heroin, so defendant drove her car to his mother's house in Chicago. Defendant went in the house alone and then asked for assistance in bagging up heroin and crack cocaine. While Vasquez was in Joy Forbes' house, defendant gave her some heroin, which she snorted. After that, defendant gave her more heroin, which she injected. The next thing she knew, she was in Cook County Hospital. A nurse told her that she was rolled out from a car onto the pavement, but defendant told her he wheeled her into the hospital in a wheelchair.

¶ 17 When Vasquez had complaints about drugs she received from "Da Hittaz," she went to defendant because she believed he was their leader. Defendant responded to her complaints. Defendant "seemed to be the person that ran things."

¶ 18 Melissa Lobb testified that defendant and Clarence Merritte sold crack cocaine and heroin out of her boyfriend's home in Ottawa. In return, defendant and Clarence Merritte gave Lobb and her boyfriend heroin and cocaine. She witnessed defendant "shaking up" drugs, which meant he put the drugs in a blender along with a cutting agent and then bagged the drugs in foil. Lobb was familiar with "Da Hittaz." Defendant told her he was a member of that group. The purpose of the group was to sell drugs. She sold drugs for defendant. Whenever she received money for drugs, she

immediately gave it to defendant.

¶ 19 Lobb went to Chicago to Joy Forbes' house approximately 10 times. Most of those times were with defendant. The first time Lobb went to Forbes' house, defendant gave her heroin. Lobb used the heroin in the presence of Forbes and defendant. On other trips to Joy Forbes' house, defendant went to the basement to bag up drugs while Forbes observed. After bagging up the drugs, defendant gave them to Lobb to "hold," which meant put in her pants. Each time she went to Chicago, she used heroin and left with drugs to take to Ottawa.

¶ 20 Based on the evidence presented, the trial court found defendant guilty of four counts of unlawful possession of a controlled substance with intent to deliver and one count of criminal drug conspiracy. In finding defendant and his co-defendants guilty of conspiracy, the court explained:

> "In this Court's opinion, given the testimony of the whole, and I take these individual girls that have testified, I take their testimony with suspicion. I take it with caution, and I am not just taking everything they say as absolute gospel truth. But when I take them as a whole, I start to see certain truths that do come out that I am convinced of individually and that show to me that as the trier of fact, using my experiences in life, that there seems to be something here. There is something here. And the Court is convinced there is something here."

The court sentenced defendant to 20 years in prison for the criminal drug conspiracy conviction. The court did not sentence defendant for the possession counts.

¶ 21 Defendant appealed, arguing that his four convictions for unlawful delivery should be vacated under the one-act, one-crime rule. We affirmed defendant's conviction and sentence. *People v. Merritte*, No. 3-08-0785 (2010) (unpublished order under Supreme Court Rule 23).

¶ 22 Thereafter, defendant filed a *pro se* postconviction petition, alleging that he was denied effective assistance of trial and appellate counsel because (1) his trial counsel failed to object when Officer Girton provided testimony of Joy Forbes' statements about defendant's involvement in "Da Hittaz," and (2) his appellate counsel failed to raise the issue on appeal. The trial court dismissed defendant's postconviction petition as "frivolous and patently without merit."

¶ 23 The Post-Conviction Hearing Act (Act) provides for postconviction relief when a conviction arises from a substantial violation of a constitutional right. *People v. Douglas*, 2011 IL App (1st) 093188, ¶ 18. A defendant bears the burden of demonstrating that he qualifies for relief under the Act. *Id*. A *pro se* postconviction petition must clearly set forth the respects in which the petitioner's constitutional rights were violated. *Id*. at ¶ 20. A petition must also set forth facts which can be corroborated and are objective in nature. *Id*.

¶ 24 At the first stage of the postconviction process, dismissal is proper when the petition is "frivolous or is patently without merit." *Id*. at ¶ 19. A petition is frivolous or patently without merit when it has no arguable basis either in law or in fact. *Id*. A trial court should summarily dismiss a postconviction petition as frivolous and patently without merit if its lack of legal and factual merit is certain and indisputable. *People v. Coleman*, 2012 IL App (4th) 110463, ¶ 49. We review a first-stage summary dismissal *de novo*. *Douglas*, 2011 IL App (1st) 093188, ¶ 20.

¶ 25 Unlike a jury, a trial judge in a bench trial is presumed to know the law and to follow it; this presumption may only be rebutted when the record affirmatively shows otherwise. *People v. Yancy*, 368 Ill. App. 3d 381, 386 (2005); *People v. Thorne*, 352 Ill. App. 3d 1062, 1078 (2004). A trial judge, when acting as the finder of fact, is presumed to have considered only admissible evidence in reaching his decision. *People v. Davis*, 337 Ill. App. 3d 977, 990 (2003).

¶ 26 Claims of ineffective assistance of counsel are evaluated under the prevailing two-prong *Strickland* test to determine (1) if counsel's performance was deficient, and (2) whether there is a reasonable probability that the result of the trial would have been different but for counsel's deficiencies. *People v. Garmon*, 394 Ill. App. 3d 977, 986 (2009). When reviewing a first-stage dismissal of a postconviction petition, the court does not apply the *Strickland* test but, rather, the "arguable" *Strickland* test. *Coleman*, 2012 IL App (4th) 110463, ¶ 49. At the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance may not be summarily dismissed if (1) it is arguable that counsel's performance fell below an objective standard of reasonableness, and (2) it is arguable that the defendant was prejudiced. *Id*.

¶ 27 A defendant's failure to prove prejudice is sufficient to reject his claim of ineffective assistance of counsel. *Douglas*, 2011 IL App (1st) 093188, ¶ 45. The admission of hearsay evidence is harmless and does not warrant reversal if there is no reasonable probability that the verdict would have been different had the hearsay been excluded. *Garmon*, 394 Ill. App. 3d at 989; *Yancy*, 368 Ill. App. 3d at 385. A defendant claiming ineffective assistance of counsel based on his trial counsel's failure to object to hearsay testimony cannot establish the prejudice prong of the *Strickland* test if the admissible evidence against the defendant is overwhelming or the inadmissible hearsay evidence is cumulative of admissible evidence. See *People v. Theis*, 2011 IL App (2d) 091080, ¶ 41; *People v. Martin*, 408 Ill. App. 3d 44, 51-52 (2011); *People v. Alexander*, 354 Ill. App. 3d 832, 846-47 (2004). It is not arguable that a defendant is prejudiced by trial counsel's failure to object to hearsay evidence where there is admissible evidence establishing the same fact. See *People v. Hesler*, 60 Ill. App. 3d 59, 62 (1978).

¶ 28 Here, the trial court dismissed defendant's postconviction petition at the first stage of

postconviction proceedings, finding that it was "frivolous and patently without merit." We find that dismissal was appropriate for two reasons.

¶ 29 First, we presume that the trial judge did not consider Officer Girton's testimony of Joy Forbes' statements when determining defendant's guilt on the conspiracy count because that testimony constituted inadmissible hearsay against defendant. See *Davis*, 337 Ill. App. 3d at 990. Defendant failed to overcome that presumption by pointing out any evidence or statements in the record suggesting that the trial court considered the inadmissible testimony against defendant. *Yancy*, 368 Ill. App. 3d at 386; *Thorne*, 352 Ill. App. 3d at 1078. To the contrary, the record suggests that the trial court did not consider such testimony in determining defendant's guilt on the drug conspiracy count. In explaining its ruling on that count, the trial court stated that it relied on the testimony of "the girls," presumably the "trappers" who consistently testified that they held and sold drugs for defendant. The court made no mention of Officer Girton's testimony or Joy Forbes' statements about defendant, so we must presume the court did not consider them when determining defendant's guilt.

¶ 30 Furthermore, even if we were to consider defendant's ineffective assistance claim, we would find that defendant cannot arguably establish prejudice. At trial, seven witnesses (Sinkler, Henry, Smith, Morgan, Bradley, Vasquez and Lobb) testified that defendant was a member of "Da Hittaz," was the leader of "Da Hittaz," earned his money from selling drugs, and/or had no legitimate job. These were the same statements that Joy Forbes made to Girton. Because Girton's testimony was merely cumulative of admissible testimony, Girton's hearsay statements were not arguably prejudicial to defendant. See *Martin*, 408 Ill. App. 3d at 51-52; *Alexander*, 354 Ill. App. 3d at 846-47; *Hesler*, 60 Ill. App. 3d at 62.

¶ 31 Because defendant failed to present an arguable claim of ineffective assistance of counsel, the trial court properly dismissed defendant's postconviction petition.

¶ 32 The judgment of the circuit court of La Salle County is affirmed.

¶ 33 Affirmed.