2012 IL App (4th) 100161-U Filed 8/2/12

NO. 4-10-0161

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Jersey County
SAMUEL L. PACE,	)	No. 96CF35
Defendant-Appellant.	)	
	)	Honorable
	)	Tim P. Olson,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Steigmann and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: Defense counsel's motion to withdraw as counsel under *Pennsylvania v. Finley*, 481 U.S. 551 (1987) allowed as no meritorious issues can be raised in this case. Where appellate counsel failed to raise certain issues on appeal, it cannot be shown the outcome on appeal would have been different had those issues been raised.

¶ 2 This case comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal on the ground no meritorious issues can be raised in this case. For the reasons that follow, we agree and affirm.

¶ 3 I. BACKGROUND

¶ 4 In June 1997, defendant, Samuel Pace, was convicted of first degree murder (720 ILCS 5/9-1(a)(1) (West Supp. 1995)). He was sentenced to a term of natural life imprisonment. Defendant pursued a direct appeal. We affirmed his conviction and sentence. *People v. Pace*,

No. 5-97-0467 (December 1, 1998) (unpublished order under Supreme Court Rule 23).

¶ 5 In July 1999, defendant filed a *pro se* postconviction petition, which included 28 allegations of trial counsel error, 17 allegations of appellate counsel error, and 17 allegations of prosecutorial misconduct. In September 1999, the trial court determined several allegations were "of concern" and found other claims were frivolous or patently without merit. Counsel was appointed and on October 30, 2000, filed a "Motion to Vacate Sentence and for New Trial" asserting a claim pursuant to *Apprendi v. New Jersey*, 530 U. S. 466 (2000).

¶ 6 On April 2, 2007, appointed counsel filed a "Petition for Voluntary Dismissal Without Prejudice." Counsel stated after reviewing defendant's petition, meeting with him, conducting interviews of witnesses, and soliciting affidavits related to the petition, he concluded "currently there is no colorable argument for a post-conviction petition." Counsel requested the dismissal be with leave to refile if appropriate evidence along with affidavits became available. On June 12, 2007, the trial court dismissed defendant's petition.

¶ 7 On January 16, 2008, defendant filed a *pro se* "Late Motion to Reconsider Dismissal of Post-conviction Petition" in which he sought to "reinstate" the petition "as a whole." On March 19, 2008, the trial court denied defendant's motion. Defendant appealed, and this court reversed and remanded for further proceedings. *People v. Pace*, 4-08-0260 (Dec. 19, 2008) (unpublished order under Supreme Court Rule 23).

¶ 8 On August 12, 2009, appointed counsel filed an amended petition for postconviction relief. Counsel filed a certificate in compliance with Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984). On August 31, 2009, the State filed a response to the amended petition. On October 21, 2009, appointed counsel filed a second amended petition for

postconviction relief. On January 29, 2010, the trial court denied defendant's second amended petition as legally inadequate. On February 25, 2010, defendant filed a timely notice of appeal, and OSAD was appointed to represent him. OSAD has filed a motion to withdraw as counsel under *Pennsylvania v. Finley*, 481 U.S. 551 (1987), asserting no issues of arguable merit warrant appeal. The record shows service of the motion on defendant. On our own motion, we granted defendant leave to file additional points and authorities by April 26, 2011. After receiving several extensions of time to file, defendant was granted leave to file additional points and authorities by December 22, 2011. He filed those on December 21, 2011. He has repeated his arguments from his postconviction petition, alleging the court erred in dismissing his second amended postconviction petition because he was denied effective assistance of appellate counsel. On January 13, 2012, the State filed its response to defendant's points and authorities. After examining the record in accordance with our duties under *Finley*, we affirm the trial court's judgment and grant OSAD's motion to withdraw as counsel on appeal.

¶ 9 II. ANALYSIS

¶ 10 OSAD argues no colorable argument can be made the trial court erred by dismissing defendant's second amended postconviction petition. Specifically, OSAD contends the court's findings and conclusions are supported by the law and the facts.

¶ 11 The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 to 122-8 (West 2008)) established a three-step process for adjudicating postconviction petitions. In the first stage, a defendant files a petition and the trial court determines whether it presents the "gist of a constitutional claim." *People v. Porter*, 122 Ill. 2d 64, 74, 521 N.E.2d 1158, 1161 (1988). If the court does not dismiss the petition at the first stage, the proceeding advances to the second stage

where the court appoints counsel to represent an indigent defendant. 725 ILCS 5/122-4 (West 2008). "Counsel may file an amended postconviction petition." *People v. Gaultney*, 174 Ill. 2d 410, 418, 675 N.E.2d 102, 106 (1996). The State may file a motion to dismiss or answer to the petition. 725 ILCS 5/122-5 (West 2008).

¶ 12 The relevant question at the second stage is whether the allegations of the petition, supported by the record and accompanying documents, if any, demonstrate a substantial showing of a constitutional violation. *People v. Edwards*, 197 Ill. 2d 239, 245-46, 757 N.E.2d 442, 446 (2001). Here, defendant's petition advanced to the second stage, and the trial court dismissed the case on legal grounds.

¶ 13 Dismissal of a postconviction petition without an evidentiary hearing is reviewed *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 389, 701 N.E.2d 1063, 1075 (1998). A reviewing court may sustain a trial court's decision on any grounds contained in the record regardless of the original basis for the decision. *People v. Caballero*, 179 Ill. 2d 205, 211, 688 N.E.2d 658, 661 (1997).

¶ 14 Section 122-5 of the Act provides a court may enter orders in postconviction cases "as is generally provided in civil cases." 725 ILCS 5/122-5 (West 2008). Where an amendment is complete in itself and does not refer to or adopt a prior pleading, the earlier pleading ceases to be a part of the record for most purposes, being, in effect, abandoned and withdrawn. See *Poke v. Illinois Power Co.*, 187 Ill. App. 3d 631, 634, 543 N.E.2d 1085, 1087 (1989). Although defendant raised numerous issues in his *pro se* postconviction petition, once it was amended, the second amended petition for postconviction relief contained the only claim the trial court was required to consider, that of ineffectiveness of appellate counsel.

¶ 15 Defendant's claim of ineffectiveness of appellate counsel has three parts, all related to the court's denial of defendant's motion to suppress evidence, based on the grounds the warrantless entry of his home and his arrest were illegal. The court relied on the emergency exception to the requirement of a warrant to find entry into defendant's home and his arrest as legal and denied the motion to suppress. This argument was based on the testimony at the suppression hearing of Jersey County sheriff Frank Yocum. Sheriff Yocum testified he went to defendant's house after a tip there was a dead body in defendant's garage and defendant had confessed to killing the victim. He looked in the garage window and saw a woman's body.

¶ 16 Appellate counsel did not appeal the denial of defendant's motion to suppress evidence. Defendant argues counsel was ineffective for failure to raise this issue on appeal. Defendant's first allegation of ineffectiveness on the part of appellate counsel is the failure to point out Sheriff Yocum's testimony was inconsistent with the reports of other sheriff's deputies at the scene and his own grand jury testimony where he stated the windows of the garage were covered and they could not see in. Defendant argues, had appellate counsel pointed out these discrepancies, the result on appeal would have been different because the appellate court would have seen the trial court could not rely on Yocum's assertion he saw a body before arresting defendant and going into the garage.

¶ 17 Defendant also asserts Sheriff's Yocum's inconsistent versions of what he did or did not see in the garage would have prevented any finding of the emergency exception. The only "emergency" defendant argues was the occurrence of a homicide and that is insufficient to justify use of the emergency exception. See *Mincey v. Arizona*, 437 U.S. 385, 394 (1978). He also contends there could not have been any concern on the part of the sheriff as to destruction of

evidence because defendant was seen lying on his couch when officers arrived. He argues the officers could not have been concerned anyone was injured as they did not bring emergency medical personnel with them.

¶ 18 Defendant's third claim in his second amended postconviction petition is the doctrine of inevitable discovery of evidence did not apply because any second entry into defendant's home after getting a warrant would not be independent of the unlawful entry because the allegations in the warrant were the product of the unlawful entry. He contends, had appellate counsel argued the unlawful entry on appeal and argued it properly, inevitable discovery would not have been available and most of the evidence upon which the State relied in convicting him would have been suppressed.

¶ 19 A. Ineffective Assistance of Counsel

¶ 20 In order to establish a claim of ineffective assistance of counsel, a defendant must prove (1) his counsel's representation fell below an objective standard of reasonableness and deprived him of a fair trial and (2) there is a reasonable probability but for counsel's unprofessional errors, the results of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984); *People v. Albanese*, 104 Ill. 2d 504, 525, 473 N.E.2d 1246, 1255 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. In determining if there is prejudice, the court examines the totality of the circumstances. *Strickland*, 466 U.S. at 695.

¶ 21 Claims of ineffective assistance of counsel are also evaluated under the *Strickland* test. *People v. Enis*, 194 Ill. 2d 361, 377, 743 N.E.2d 1, 11 (2000). Appellate counsel is not obligated to brief every conceivable issue on appeal and it is not incompetence of counsel to

refrain from raising issues which in his judgment are without merit. *People v. Mitchell*, 189 Ill. 2d 312, 332, 727 N.E.2d 254, 267 (2000). A defendant who claims appellate counsel was ineffective for failing to raise an issue on appeal must allege facts demonstrating such failure was objectively unreasonable. *Enis*, 194 Ill. 2d at 377, 743 N.E.2d at 11. If the underlying issue is not meritorious, defendant has suffered no prejudice. *Id.*

¶ 22 B. Emergency Exception

¶ 23 No warrant is necessary when police enter into and search residential premises with a reasonable belief immediate action is necessary for the purpose of protecting and preserving life or property and to avoid serious injury. *Mincey*, 437 U.S. at 392*; People v. Griffin*, 158 Ill. App. 3d 46, 50, 510 N.E.2d 1311, 1315 (1987). The basic elements of the emergency exception to the general warrant requirement are (1) police must have reasonable grounds to believe there is an emergency at hand and immediate need for their assistance for the protection of life or property and (2) there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched. *People v. Thornton*, 286 Ill. App. 3d 624, 630, 676 N.E.2d 1024, 1028 (1997).

¶ 24 " 'An action is "reasonable" under the fourth amendment, regardless of the individual officer's state of mind, "as long as the circumstances, viewed objectively, justify [the] action." [Citation] The officer's subjective motivation is irrelevant.' " (Emphasis omitted.) *People v. Wear*, 229 Ill. 2d 545, 566, 893 N.E.2d 631, 644 (2008) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006). In making a retroactive determination, the totality of the circumstances confronting the officers at the time the entry was made must be evaluated. *People v. Wimbley*, 314 Ill. App. 3d 18, 24, 731 N.E.2d 290, 294 (2000). If the entry was valid under the

circumstances, then evidence of the crime discovered during the entry may be legally seized without a warrant. *Griffin*, 158 Ill. App. 3d at 51, 510 N.E.2d at 1315. In evaluating the totality of the circumstances, courts look to whether:

> "(1) the crime under investigation was recently committed; (2) there was any deliberate or unjustified delay by the police during which time a warrant could have been obtained; (3) a grave offense was involved, particularly a crime of violence; (4) there was reasonable belief that the suspect was armed; (5) the police officers were acting on a clear showing of probable cause; (6) there was a likelihood that the suspect would escape if he was not swiftly apprehended; (7) there was strong reason to believe the suspect was in the premises; and (8) the police entry was made peaceably, albeit nonconsensually." *People v. McNeal*, 175 Ill. 2d 335, 345, 677 N.E.2d 841, 846 (1997).

¶ 25 It is always preferable to obtain a warrant for a person's arrest or entry into their home. However, in this case, the conduct of the officers in acting without a warrant was reasonable under the circumstances. Their conduct was reasonable even if there was a dispute as to whether Sheriff Yocum saw a body in defendant's garage.

¶ 26 The circumstances presented to Sheriff Yocum were (1) on April 17, 1996, Jeff Pace, defendant's brother, called Yocum at home about 11 p.m. and reported he received a telephone call from defendant about four hours earlier in which defendant told him he had murdered Madge Crader and wanted Jeff's help in disposing of her body; (2) Jeff went to defendant's house and saw a body of a woman in the garage whose throat had been cut and was

bleeding; (3) Jeff described the woman as dead; (4) Jeff did not help defendant and left his house; (5) Jeff waited to call Yocum due to disbelief the murder actually happened; (6) Yocum spoke to defendant's father and stepmother, gathered a team of deputies and approximately 30 minutes later went to defendant's house to determine if there was dead body in his garage; (7) the offense was grave and one of violence; (8) the officers had reason to believe defendant was home due to a monitoring device on his ankle because he was on probation; (9) the officers had reason to believe defendant might be armed as Jeff reported the victim's throat had been cut; and (10) upon arrival at defendant's house, the officers saw him lying on his couch with observable blood on him and a cut on his hand.

¶ 27 Based on these factors, the officers had probable cause to enter defendant's home and garage regardless of whether Sheriff Yocum or his deputies saw into the garage and noticed a body. Whether Yocum could see into the garage is not material to a determination of reasonable grounds there was an emergency and immediate need for assistance in the protection of life and an association of the emergency with the place the officers entered. Jeff provided grounds to believe there may be an emergency. Although he reported the victim to be dead, she may still have been alive. Defendant also sought his help in disposing of the body. There was a slight delay in responding to Jeff's report, but it was only 30 minutes before the deputies responded.

¶ 28 After entering defendant's house and arresting defendant, one of the deputies saw a set of keys sitting in plain sight and asked defendant what the keys opened. Defendant said they opened the padlock on the garage. The deputies took the keys, opened the garage and saw the body. One of the officers found a ball-peen hammer in the kitchen sink covered in what appeared to be blood and hair. Defendant was taken to jail.

¶ 29 The officers returned to defendant's house with a search warrant. They found a bloody knife and sledgehammer near the body, the ball-peen hammer in the sink, blood on the couch and clothes dryer, and blood spatters in several areas of the garage. They also found the clothes defendant had been wearing earlier in a washing machine and metal eyelets and hooks in a woodburning stove similar to the fasteners for the boots Crader wore earlier. All of this evidence was used against defendant at trial.

¶ 30 The police had reasonable grounds to enter defendant's garage under the emergency exception, and any argument by appellate counsel to the contrary would have been rejected. We note defendant's status as a probationer could have played a part in our analysis had that been raised or argued. Counsel's performance was not objectively unreasonable and defendant was not prejudiced.

¶ 31 C. Inevitable Discovery

¶ 32 Defendant's argument is based on a finding the entry of defendant's garage was unconstitutional and the evidence would not have been discovered without the constitutional violation. Although there is an exception in such circumstances where the evidence would ultimately have been found absent the violation (see *Nix v. Williams*, 467 U.S. 431, 444 (1984)), defendant argues it is not applicable here.

¶ 33 As we have determined the entry into the garage was based on the emergency exception to the requirement of a search warrant, there is no viable issue as to the admissibility of the evidence obtained after the issuance of the search warrant. We also note there is no viability to defendant's argument the search warrant was obtained using information obtained via the officers' entry into the garage prior to its issuance.

¶ 34 While the complaint for search warrant did include the observations of the body in the garage by the officers, it was based primarily on the information provided by Jeff. If the officers' observations were omitted from the complaint, there was still probable cause for the warrant to be issued. The evidence would have been discovered without resorting to any information gained prior to the issuance of the search warrant.

¶ 35 Appellate counsel was not objectively unreasonable for failing to raise this issue on direct appeal and defendant was not prejudiced by this decision.

¶ 36 After reviewing the trial court record, we find the court properly dismissed the defendant's second amended postconviction petition and OSAD's motion to withdraw as counsel on appeal is granted.

¶ 37 III. CONCLUSION

¶ 38 The motion to withdraw as counsel is allowed and the judgment of the trial court is affirmed. As part of our judgment, we grant the State its statutory assessment of $50 against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2006).

¶ 39 Affirmed.