2012 IL App (4th) 100900-U

Filed 3/16/12

NO. 4-10-0900

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
CHRISTOPHER NEAL,	)	No. 06CF224
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas E. Little,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Pope and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court correctly dismissed defendant's postconviction petition at the second stage because his claims that trial and appellate counsel were ineffective are groundless.

¶ 2 Following a June 2006 trial, a jury convicted defendant, Christopher Neal, of unlawful possession of a controlled substance with intent to deliver within 1,000 feet of a school (720 ILCS 570/407(b)(1) (West 2006)). The trial court later sentenced defendant to 15 years in prison. Defendant appealed, and this court affirmed. See *People v. Neal*, No. 4-06-0631 (Nov. 6, 2007) (unpublished order under Supreme Court Rule 23).

¶ 3 In May 2008, defendant filed an amended petition under the Post-Conviction Hearing Act (725 ILCS 5/122-1 through 122-8 (West 2008)), and the State responded by filing a motion to dismiss defendant's petition. Following a July 2010 hearing, the trial court granted the

State's motion.

¶ 4 Defendant appeals, arguing that the trial court erred by dismissing his postconviction petition, given that he made a substantial showing that his trial and appellate counsel were ineffective for failing to challenge the validity of a February 2006 search warrant. We disagree and affirm.

¶ 5 I. BACKGROUND

¶ 6 On February 9, 2006, Detective Carl Carpenter, as affiant, sought a warrant to search defendant and "646 W. Macon apartment A in Decatur, Macon County Illinois." Carpenter's complaint for search warrant stated, in pertinent part, the following:

> "[Carpenter] says that he has probable cause to believe, based upon the following facts, that the above listed things are to be seized are now located upon the (person and) premises [at 646 W. Macon apartment A].
>
> 2. *** Carpenter states that between February 6[,] and February 9[,] 2006[,] that Carpenter and other Narcotics Detectives *** have been conducting a drug investigation into the sale of controlled substances (crack cocaine) from the residence at 646 W. Macon apartment A which is located in Decatur, Macon County Illinois.
>
> 3. *** Carpenter states [that] on several occasions, Carpenter met with Pat Doe (assumed name) who is a confidential source for The Decatur Police Department. Pat Doe knows ***

Carpenter to be a Police Officer.

4. At one of these meetings between Doe and Carpenter, Carpenter states [that] Doe was searched and no money or contraband was located on Doe's person. Doe was then issued US Currency by Carpenter to purchase controlled substances from the person identified by Doe as [defendant] at 646 W. Macon in Decatur, Macon Co., Illinois. [Defendant] was identified by Doe from a Macon County Jail booking photo as the person selling crack from 646 W. Macon apartment A.

5. On this occasion between February 6[,] and February 9[,] 2006[,] Doe was followed to the area of 646 W. Macon. Doe was kept under constant surveillance. Doe did not meet with anyone while traveling to 646 W. Macon. *On Doe's arrival Doe was observed entering 646 W. Macon.* A short time later Doe was observed leaving the apartment.

6. Doe was then followed to a pre[-]determined meeting location. Doe did not meet with anyone while returning to the pre[-]determined location. On arrival at the pre[-]determined location Doe gave to Carpenter a quantity of purported crack cocaine (a controlled substance). Doe was again searched by Carpenter and no currency or contraband was located.

7. Doe stated to Carpenter that on arrival [at] 646 W.

> Macon *** that Doe was allowed entry into the residence by [defendant]. Doe stated that [defendant] then produced a quantity of purported crack cocaine (a controlled substance) which [defendant] represented to be crack cocaine. Doe stated that [defendant] then exchanged (sold) some of the purported crack cocaine to Doe in exchange for the US Currency which Doe was provided by Carpenter. After the purchase[,] Doe state[d] that Doe again met with Carpenter and gave Carpenter the purported crack cocaine (controlled substance)[.]
>
> 8. Carpenter states that a small[] portion of the purported crack cocaine (controlled substance) was field tested with the use of a certified test kit. The results of the field test showed positive results for the presence of cocaine base salts." (Emphasis added.)

Shortly thereafter, the trial court issued the search warrant.

¶ 7 The next day, the police executed that warrant on 646 W. Macon, apartment A. The police found (1) defendant (who was sitting on a toilet), (2) bags with cocaine residue, and (3) a large amount of cash. A subsequent search of the drainpipe below the apartment revealed 2.5 grams of a substance containing cocaine.

¶ 8 On February 14, 2006, the State charged defendant with unlawful possession of a controlled substance with intent to deliver within 1,000 feet of a school (720 ILCS 570/407(b)(1) (West 2006)). (Defendant's apartment was approximately 350 feet away from a school.) Following a June 2006 trial, at which counsel did not challenge the February 2006 search

warrant, the jury convicted defendant of that charge. Shortly thereafter, the trial court sentenced defendant to 15 years in prison. Defendant appealed, again without challenging the validity of the February 2006 warrant, and this court affirmed. See *Neal*, No. 4-06-0631 (unpublished order under Supreme Court Rule 23).

¶ 9 In May 2008, defendant filed an amended petition for postconviction relief under the Act (725 ILCS 5/122-1 through 122-8 (West 2008)), asserting that the February 2006 search warrant was based on false statements made by police and that his trial and appellate counsel were ineffective for failing to challenge it. The State responded by filing a motion to dismiss defendant's petition. Following a July 2010 hearing, the trial court granted the State's motion.

¶ 10 This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 Defendant argues that the trial court erred by dismissing his postconviction petition, given that he made a substantial showing that his trial and appellate counsel were ineffective for failing to challenge the validity of the February 2006 search warrant. Specifically, defendant contends that the court erred because he set out a valid argument about the potential success of a motion to suppress, pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674 (1978). That case holds that "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." *Franks*, 438 U.S. at 155-56, 98 S. Ct. At 2676. Defendant asserts that because Doe was never seen entering apartment A, given that the entrances to the individual

apartments within the apartment building cannot be seen from the outside, Carpenter could not have known that Doe actually entered apartment A, which Carpenter "falsely" averred in his complaint for a search warrant. We disagree.

¶ 13 A. Postconviction Proceedings and the Standard of Review

¶ 14 In *People v. Andrews*, 403 Ill. App. 3d 654, 658-59, 936 N.E.2d 648, 652-53 (2010), this court outlined postconviction proceedings under the Act, as follows:

> "A defendant may proceed under the Act by alleging that 'in the proceedings which resulted in his or her conviction[,] there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both.' 725 ILCS 5/122-1(a)(1) (West 2006). In noncapital cases, the Act establishes a three-stage process for adjudicating a postconviction petition. 725 ILCS 5/122-1 through 122-8 (West 2006); *People v. Jones*, 213 Ill. 2d 498, 503, 821 N.E.2d 1093, 1096 (2004). At the first stage, 'the trial court, without input from the State, examines the petition *only* to determine if [it alleges] a constitutional deprivation unrebutted by the record, rendering the petition neither frivolous nor patently without merit.' (Emphasis in original.) *People v. Phyfiher*, 361 Ill. App. 3d 881, 883, 838 N.E.2d 181, 184 (2005). 'Section 122-2.1 [of the Act] directs that if the defendant is sentenced to imprisonment (rather than death) and the circuit court determines that the petition is frivolous or patently without merit, it

shall be dismissed in a written order. 725 ILCS 5/122-2.1(a)(2) (West 2004).' *People v. Torres*, 228 Ill. 2d 382, 394, 888 N.E.2d 91, 99-100 (2008).

If a petition is not dismissed at stage one, it proceeds to stage two, where section 122-4 of the Act provides for the appointment of counsel for an indigent defendant who wishes counsel to be appointed. 725 ILCS 5/122-4 (West 2006). At the second stage, the State has the opportunity to answer or move to dismiss the petition. 725 ILCS 5/122-5 (West 2006). If the trial court does not grant the State's motion to dismiss or if the State has filed an answer, the petition proceeds to the third stage, where the defendant may present evidence in support of his petition. 725 ILCS 5/122-5, 122-6 (West 2006)."

¶ 15 Here, the trial court dismissed defendant's postconviction petition following a second-stage hearing on the State's motion to dismiss. "[T]he dismissal of a postconviction petition at the second stage is warranted only when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation." *People v. Snow*, 2012 IL App (4th) 110415, ¶ 15, 2012 WL 78460 at 4. We review *de novo* the trial court's dismissal of a postconviction petition at the second stage. *Id.*

¶ 16 B. Defendant's Claims of Ineffective Assistance of Counsel

¶ 17 As previously explained, the basis for defendant's postconviction claim in this case is that both his trial and appellate counsel were ineffective for failing to challenge

Carpenter's complaint for search warrant because that complaint demonstrates on its face that Carpenter falsely averred that he witnessed his confidential informant, Doe, enter apartment A, which was impossible. Claims of ineffective assistance of counsel are judged under the familiar standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). Under the *Strickland* standard, a defendant must show that (1) counsels' performance fell below an objective standard of reasonableness and (2) a reasonable probability exists that, but for counsels' unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 688, 690, 694, 104 S. Ct. at 2066, 2068.

¶ 18 In *People v. Bryant*, 389 Ill. App. 3d 500, 527-535, 906 N.E.2d 129, 150-157 (2009), this court discussed at length when a *Leon* hearing should be conducted. See *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405 (1984). We explained that a *Leon* hearing should be conducted only after defendant has made a substantial preliminary showing that the search warrant affiant deliberately included falsehoods or included allegations with a reckless disregard for the truth. *Bryant*, 389 Ill. App. 3d at 530, 906 N.E.2d at 153. Here, the record shows nothing of the sort.

¶ 19 In Carpenter's February 2006 complaint for search warrant, he never asserted that he witnessed Doe enter apartment A. Instead, Carpenter averred in his complaint that he observed Doe enter the apartment *building* at 646 W. Macon, not that he observed Doe enter apartment A specifically. The information regarding apartment A came from Doe himself when he told Carpenter that he had purchased the crack cocaine from defendant inside apartment A. The other information Carpenter provided the court—namely, (1) the relationship he had with Doe as an informant, (2) the fact that he observed Doe enter and leave the apartment building, (3)

that Doe identified defendant from a booking lineup as the man in apartment A, and (4) that Doe relayed to him a detailed account of the drug transaction with defendant in apartment A—supported Doe's claim in that regard.

¶ 20 This record demonstrates that defendant had no grounds upon which to seek a *Franks* hearing. Accordingly, because we conclude that neither of his counsel was ineffective for failing to raise that issue, we reject defendant's argument that the trial court erred by dismissing his postconviction petition.

¶ 21 III. CONCLUSION

¶ 22 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we grant the State its $50 statutory assessment as costs of this appeal.

¶ 23 Affirmed.