2012 IL App (4th) 110213-U

Filed 8/28/12

NO. 4-11-0213

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. BRUCE H. KNOX, Defendant-Appellant.	)	Appeal from Circuit Court of Champaign County No. 06CF2068 Honorable Heidi N. Ladd, Judge Presiding.

JUSTICE McCULLOUGH delivered the judgment of the court.
Presiding Justice Turner and Justice Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court grants the office of the State Appellate Defender's motion to withdraw as appellate counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and affirms the trial court's judgment where no meritorious issues could be raised on appeal as to whether (1) defendant was deprived of a right to defend himself by police officer's use of cellular phones, (2) evidence was discovered in violation of the fourth amendment, and (3) defendant's sentence violated the rule of lenity.

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

¶ 3 In December 2006, defendant, Bruce H. Knox, was charged by information with unlawful possession of a controlled substance, a Class 4 felony (720 ILCS 570/402(c) (West 2006)).

¶ 4 In June 2007, the trial court held a hearing on defendant's motion to suppress. Defendant argued a pretextual traffic stop without reasonable suspicion or probable cause resulted in his arrest and subsequent search. Defendant testified he drove a blue Dodge Shadow on December 19, 2006. After he left the County Market parking lot in Urbana, Illinois, he was pulled over at approximately 4 p.m. Sylvia Morgan of the Urbana police department pulled defendant over for nonoperating vehicle taillights. Defendant purchased the Dodge three days prior to the traffic stop and the taillights were in working order at that time. Defendant did not have his vehicle lights on as it was daylight. Defendant told Morgan he did not have a driver's license or vehicle insurance, and she placed him under arrest. Another officer searched defendant's person and found a bag containing crack cocaine.

¶ 5 Jay Loschen testified he and other members of the Urbana police Street Crimes Unit were surveilling a County Market parking lot in an unmarked vehicle on December 19, 2006. Recently prior, County Market employees filed complaints with the police department about suspected drug activity in the parking lot. Shortly before 4 p.m., Loschen observed a blue Dodge Shadow drive into the County Market parking lot, pick up an older man, drive a few hundred feet, and drop the man off. Based upon the complaints and his training and experience, Loschen believed a drug transaction occurred. The unit contacted another patrol officer to facilitate a traffic stop on the Dodge. When Loschen arrived at the traffic stop location, defendant was in police custody. Loschen searched defendant's person. The search of defendant's waistband revealed a sandwich bag containing three smaller bags containing a white chunky substance. Loschen believed this substance to be crack cocaine. Loschen advised defendant of his *Miranda* rights (*Miranda v. Arizona*, 384 U.S. 436 (1966)) and, thereafter,

defendant told Loschen he used crack cocaine.

¶ 6 Sylvia Morgan of the Urbana police department testified she received a request from the Street Crimes Unit to stop a blue Dodge Shadow. She identified a vehicle matching the description provided by the unit. Morgan followed behind and observed the vehicle apply its brakes but was unable to see any operating brake lights. She initiated a traffic stop. As Morgan approached the vehicle, defendant volunteered he did not have a driver's license or an insurance card. Morgan requested defendant to exit the vehicle and she placed him under arrest for driving without a driver's license. Thereafter, Loschen arrived and searched defendant's person and recovered crack cocaine from defendant's waistband.

¶ 7 On cross-examination, Morgan testified Urbana officers would use cellular phones when radio traffic was heavy, but she could not recall whether she received a cellular phone or a radio call requesting assistance to facilitate the traffic stop.

¶ 8 Thereafter, the trial court denied defendant's motion to suppress finding the police officers had a valid basis to conduct a traffic stop for nonoperating brake lights, and the cocaine evidence was found pursuant to a valid search incident to arrest.

¶ 9 On December 11, 2007, defendant pleaded guilty to unlawful possession of a controlled substance. The parties stipulated to the evidence and testimony presented at the motion to suppress hearing. The factual basis stated defendant was arrested for driving without a valid driver's license and searched incident to arrest. The search yielded three bags of cocaine weighing approximately nine-tenths of a gram and defendant admitted being a cocaine user. The trial court admonished defendant he was eligible for an extended-term sentence and admonished him in accordance with Illinois Supreme Court Rule 402(a) (eff. July 1, 1997)). Additionally, the

court admonished defendant he could be sentenced *in absentia* if he did not appear for his sentencing hearing.

¶ 10 On February 4, 2008, defendant did not personally appear for sentencing. Officer John Lieb of the Champaign police department testified defendant was arrested on January 28, 2008, with two ounces of cocaine in his car. Defendant admitted he knew about one ounce of cocaine in his car. The trial court continued the sentencing hearing to permit the parties to verify information contained in the presentencing report (PSI).

¶ 11 On February 28, 2008, the sentencing hearing resumed and defendant did not personally appear. The trial court found defendant had been previously convicted in 1999 in Wisconsin of possession of cocaine with intent to deliver and in 2005 in Illinois of obstructing justice, a Class 4 felony (720 ILCS 5/31-4 (West 2004)), making him extended-term eligible. The court sentenced defendant to an extended-term sentence of six years' imprisonment.

¶ 12 Defendant did not directly appeal.

¶ 13 In November 2010, defendant filed the instant postconviction petition pursuant to section 122-1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/122-1 (West 2010)). On February 15, 2011, the trial court summarily dismissed the petition.

¶ 14 On March 14, 2011, defendant filed a notice of appeal and the trial court appointed OSAD to represent him. In February 2012, OSAD moved to withdraw as appellate counsel, including in its motion a brief in conformity with the requirements of *Pennsylvania v. Finley*, 481 U.S. 551 (1987)). The record shows service of the motion on defendant. On its own motion, this court granted defendant leave to file additional points and authorities by March 28, 2012. Defendant did not do so. After examining the record and executing our duties consistent

with *Finley*, we grant OSAD's motion and affirm the trial court's judgment.

¶ 15 OSAD asserts defendant's postconviction petition raises no meritorious issues. Specifically, OSAD contends no colorable argument can be made whether (1) the police officer's use of cellular phone instead of radio calls deprived defendant of the ability to present a defense, (2) police conducted an unconstitutional search and seizure of defendant's person, and (3) defendant's sentence violates the rule of lenity. We agree with OSAD.

¶ 16 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2010)) provides a means for a defendant to collaterally attack a prior conviction and affords only limited review of constitutional claims not presented at trial. *People v. Harris*, 224 Ill. 2d 115, 124, 862 N.E.2d 960, 966 (2007). Section 122-2.1(a)(2) provides when a petitioner is sentenced to imprisonment, the trial court shall review the petition within 90 days of its filing and docketing and enter an order if it determines it is frivolous and without merit, dismissing the same. 725 ILCS 5/122-2.1(a)(2) (West 2010).

¶ 17 To survive dismissal, a *pro se* postconviction petition's allegations, taken as true, must present the "gist" of a constitutional claim, which is a "low threshold." (Internal quotation marks omitted.) *People v. Jones*, 211 Ill. 2d 140, 144, 809 N.E.2d 1233, 1236 (2004). Otherwise, a petition is considered frivolous or patently without merit. *People v. Delton*, 227 Ill. 2d 247, 254, 882 N.E.2d 516, 519 (2008) (quoting *People v. Gaultney*, 174 Ill. 2d 410, 418, 675 N.E.2d 102, 106 (1996)). A petition is frivolous or patently without merit if it has no "arguable basis either in law or fact," which is defined as being "based on an indisputably meritless legal theory or a fanciful factual allegation." *People v. Hodges*, 234 Ill. 2d 1, 16, 912 N.E.2d 1204, 1212 (2009). A petitioner need only present a limited amount of detail in the petition, but must

allege enough facts to make out a claim that is arguably constitutional for purposes of invoking the Act. *Hodges*, 234 Ill. 2d at 9, 912 N.E.2d at 1208. The summary dismissal of a postconviction petition is reviewed *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89, 701 N.E.2d 1063, 1075 (1998).

¶ 18 Defendant does not offer an affidavit explaining what a subpoena of police radio dispatch records might show, in addition to the testimony already presented at the hearing, or how he would use information contained in such records. This is a fatal flaw. See *Delton*, 227 Ill. 2d at 255, 882 N.E.2d at 520 (failure to attach necessary affidavits, records, or other evidence is fatal to a postconviction petition).

¶ 19 Defendant's claim he was deprived of the opportunity to defend himself at trial because police officers may have used a cellular telephone rather than radios in violation of police protocol fails to present the gist of a constitutional claim. Defendant raised the issue of whether Urbana police used cellular telephones rather than police-issued radios at the June 2007 motion to suppress hearing. Defendant throughly cross-examined police officers as to their communications prior to his December 2006 arrest. As defendant failed to attach an affidavit, we are left to speculate as to what additional information these records may show or how he would attempt to use this information. Additionally, defendant has provided no support that Urbana police department regulations require officers to use police-issued radios rather than cellular phones to communicate, or how a violation of such a regulation deprived him any constitutional rights when he cross-examined the officers.

¶ 20 Moreover, defendant waived any evidentiary issues by pleading guilty. It is well settled a voluntary guilty plea waives all nonjurisdictional errors or irregularities, including

constitutional ones. *People v. Townsell*, 209 Ill. 2d 543, 545, 809 N.E.2d 103, 104 (2004). A plea of guilty admits every material fact alleged in the indictment and all the elements of the crime with which an accused is charged. *People v. Peeples*, 155 Ill. 2d 422, 494, 616 N.E.2d 294, 328 (1993) (quoting *People v. Wilfong*, 19 Ill. 2d 406, 409, 168 N.E.2d 726, 728 (1960)). A guilty plea has been described "as 'more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment.' " *People v. Manning*, 227 Ill. 2d 403, 419, 883 N.E.2d 492, 502 (2008) (quoting *Boykin v. Alabama*, 395 U.S. 238, 242 (1969)).

¶ 21 Defendant's contention his fourth amendment right to be free from unreasonable search and seizure was violated equally fails to present the gist of a constitutional claim. A search incident to arrest is one of the exceptions to the fourth amendment warrant requirement. *People v. Bridgewater*, 235 Ill. 2d 85, 93, 918 N.E.2d 553, 557 (2009). Ordinarily, in determining whether a trial court properly ruled on a motion to suppress, findings of fact and credibility determinations made by the trial court are accorded great deference and will be reversed only if it is against the manifest weight of evidence. *People v. Slater*, 228 Ill. 2d 137, 149, 886 N.E.2d 986, 994 (2008). In this case, after a lengthy motion to suppress hearing, the trial court found the traffic stop was proper and the search of defendant's person was conducted incident to arrest. Nothing in the record suggests the court erred.

¶ 22 Again, as discussed above, defendant waived any evidentiary issues, including his claim the search was in violation of the fourth amendment, by pleading guilty. Whether a motion to suppress was denied has nothing to do with whether the judgment and sentence are proper; the judgment and sentence depend on the guilty plea, not upon any evidence. *People v.*

Cunningham, 286 Ill. App. 3d 346, 349, 676 N.E.2d 998, 1001 (1997). Defendant's guilty plea waived any challenge on these grounds.

¶ 23 Last, defendant's claim his sentence violates the "rule of lenity" is without merit. Under the "rule of lenity," penal statutes, where ambiguous, are to be strictly construed to afford lenity to the accused. *People v. Jackson*, 2011 IL 110615, ¶ 21, 955 N.E.2d 1164, 1172.

¶ 24 Section 5-8-2 of the Unified Code of Corrections (Unified Code) authorizes an extended-term six-year prison sentence for a Class 4 felony. 730 ILCS 5/5-8-2(a)(6) (West 2006) (now section 5-4.5-45(a) of the Unified Code (730 ILCS 5/5-4.5-45(a) (West 2010)). An extended-term sentence is authorized where the defendant has been previously convicted in Illinois or any other jurisdiction of the same or similar class felony or greater class felony, when such conviction occurred within 10 years after the previous conviction. 730 ILCS 5/5-5-3.2(b)(1) (West 2006). At the time of the February 2008 sentencing hearing, defendant had a 1999 felony conviction for possession of cocaine with intent to deliver in Wisconsin, and a 2005 Class 4 felony conviction for obstructing justice in Illinois. Additionally, the record shows defendant was properly admonished of his extended-term eligibility.

¶ 25 Section 5-8-2 of the Unified Code is not ambiguous in permitting a six-year extended-term prison sentence, and as defendant was properly admonished on his extended-term eligibility, no colorable argument can be made that the sentence violated the rule of lenity or any constitutional right.

¶ 26 For the reasons stated herein, we grant OSAD's motion to withdraw and affirm the trial court's judgment.

¶ 27 Affirmed.