2012 IL App (4th) 110586-U

NO. 4-11-0586

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
December 18, 2012
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Logan County
FRANCHIE L. ELLIS,	)	No. 06CF57
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas M. Harris, Jr.,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justice Knecht concurred in the judgment.
Justice Appleton specially concurred.

ORDER

¶ 1 *Held*: We grant appointed counsel's motion to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987) and affirm the trial court's judgment where no meritorious issues could be raised on appeal.

¶ 2 This appeal 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. We agree, grant OSAD's motion to withdraw as counsel, and affirm the trial court's dismissal of defendant's petition.

¶ 3 I. BACKGROUND

¶ 4 A. Charges Against Defendant

¶ 5 On June 13, 2006, the State charged defendant with (1) aggravated driving under

the influence (DUI) (625 ILCS 5/11-501(d)(1)(F) (West 2006)) for driving a semitrailer while under the influence of cocaine and causing a traffic accident resulting in two deaths (count I), (2) unlawfully possessing cocaine (720 ILCS 570/402(c) (West 2006)) (count II), and (3) obstructing justice (720 ILCS 5/31-4(a) (West 2006)) by submitting a "false urine sample" (count III).

¶ 6 B. Guilty Plea Hearing

¶ 7 On August 22, 2006, Raymond L. Prusak entered his appearance as defendant's attorney. At a January 12, 2007, pretrial hearing, defendant appeared personally, but a different attorney, Dylan Barrett, appeared to represent defendant. The State described Barrett as "a partner of Mr. Prusak" and informed the trial court they had reached a partially negotiated plea. By the terms of their agreement, defendant would enter a blind plea of guilty to counts I and III, and, in return, the State would dismiss count II. The State recited the minimum and maximum terms of imprisonment for count I, aggravated DUI: "because of the two deaths[,] he would face up to 28 years in prison at 85[%] *** if this court should sentence him to prison and not less than 6 years if this court should sentence him to prison." For count III, defendant was "eligible for an extended term of up to 6 years." Barrett acknowledged those were the terms of the agreement.

¶ 8 The trial court then admonished defendant regarding the penalties he could receive for pleading guilty. Defendant acknowledged he understood he was changing his pleas on counts I and III from not guilty to guilty, the State was dismissing count II, and the sentences on counts I and III would be determined by the court.

¶ 9 The State then provided the following factual basis. If the case went to trial, the State would call Rick Price and Sandra McWhirter, who witnessed the accident, and personnel from the hospital. According to the State, these witnesses would testify to the following facts.

Defendant was driving a tractor-trailer "and that two other vehicles were coming toward him[,] [o]ne driven by a Mr. John McWhirter and another tractor[-]trailer driven by Mr. Ronald Creighton." The weather was "somewhat snowy." Defendant lost control of his semitrailer, which collided with the two oncoming vehicles. John McWhirter and Ronald Creighton died in the collision.

¶ 10 Defendant suffered an injury and was taken to the hospital. At the hospital, police requested defendant provide a urine sample. Defendant emerged from the bathroom with a urine sample, but a nurse thought the sample looked suspicious. "It looked [to her] like hand soap that contained a sandy grit that you might find from a sink trap." An inspection of the bathroom revealed "the traps had been tampered with," and it turned out the sample was not urine. Consequently, another nurse actually watched defendant produce urine for the second sample. The State also stated it could establish a chain of custody to the laboratory where the second sample tested positive for the presence of cocaine. Barrett stipulated to the State's factual basis.

¶ 11 The trial court found a factual basis existed and defendant's plea was voluntary. The court then accepted the guilty pleas to counts I and III, entered judgment on those pleas, and again announced the potential maximum sentences. The court concluded the guilty-plea hearing and set the matter for a March 21, 2007, sentencing hearing, which was continued by agreement to May 8, 2007.

¶ 12 C. Sentencing Hearing

¶ 13 On May 8, 2007, defendant appeared at the sentencing hearing personally and with Prusak. After considering the evidence in aggravation and mitigation as well as the sentencing alternatives, the trial court concluded "probation or conditional discharge would deprecate the

seriousness of this offense and be inconsistent with the ends of justice" and imprisonment was necessary for the protection of the public. The court sentenced defendant to 28 years' imprisonment on count I and 6 years' imprisonment on count III, ordering the terms to run concurrently.

¶ 14 D. Motion to Withdraw Guilty Plea

¶ 15 On May 29, 2007, Prusak filed a motion for reconsideration of the sentences, which was set for a July 31, 2007, hearing. However, on June 5, 2007, defendant filed *pro se* motions to withdraw his guilty pleas and reduce the sentences. Because the *pro se* motion to withdraw the guilty pleas accused Prusak of ineffective assistance, the trial court, on July 31, 2007, granted Prusak's motion to withdraw and appointed Jeffrey Page, an assistant public defender, to represent defendant.

¶ 16 On March 18, 2008, Page filed an amended motion to withdraw the guilty pleas, as well as an amended motion to reconsider the sentences. The amended motion to withdraw the guilty pleas alleged the following:

> "4. At the time [d]efendant tendered his plea of guilty[,] he did not understand the nature or consequences of his actions, was confused about the ramifications of his plea[,] and did not knowingly and voluntarily tender his plea of guilty to the above charges.
>
> 5. In addition, at the time [d]efendant tendered his plea of guilty, he had a misapprehension about the laws surrounding his plea of guilty.
>
> 6. Defendant believes he has a defense to the aforesaid

charges worthy of consideration by this [c]ourt and there is doubt as to the guilt of [d]efendant.

7. Justice would be better served by allowing this plea to be vacated."

¶ 17 E. Hearing on the Motion to Withdraw Guilty Plea

¶ 18 During the August 5, 2008, hearing on the amended motion to withdraw the guilty pleas, defendant testified he hired Prusak about three months after defendant entered the Logan County jail pending trial in this case. According to defendant, Prusak never privately sat down with him face to face to discuss the facts of the case, the State's evidence, or possible defenses. Defendant testified he and Prusak spoke just twice on the telephone while he was in jail for approximately 5 to 10 minutes each time. Defendant testified the second telephone conversation was pretty much a repetition of the first, *i.e.*, Prusak told him he had been in this business for a long time, and it took a while to resolve these kinds of cases. According to defendant, Prusak "really didn't go over anything about the case[,] though."

¶ 19 Other than these two telephone conversations, defendant recalled speaking with Prusak twice in the courtroom. These conversations usually occurred in the jury box. Whenever defendant had a hearing, the guards brought him from the jail to the courthouse and seated him in the jury box, and when Prusak arrived for the hearing, he would come up to the jury box and speak with defendant before the hearing began. Defendant testified: "[B]asically[,] he just would tell me about what was going on, what would happen today[,] you know[,] at that particular day[] and about nothing much." However, defendant also testified one of their conversations in the jury box concerned whether defendant should stick with his demand for a jury trial or waive a

jury and have a bench trial.

¶ 20 At the counsel table, Prusak and defendant had a conversation about entering open pleas of guilty, by which, Prusak explained, defendant would put himself at the trial court's mercy. Defendant testified: "He said that I would probably get the minimum three or four years." Defendant testified he knew the statutory minimum was six years. However, when he asked Prusak about the discrepancy, Prusak again stated the sentence would be three to four years.

¶ 21 On cross-examination, defendant testified: "I knew that the sentence was 6 to 28 [years' imprisonment but Prusak] said the minimum was like 3 to 4 [years' imprisonment] and I never questioned him[,] you know." Defendant admitted the 3- to 4-year figure could have come from the fact defendant would serve 85% of his sentence.

¶ 22 Page then introduced a nine-count complaint the Attorney Registration and Disciplinary Commission (ARDC) had filed against Prusak on August 29, 2006, in *In re Raymond L. Prusak*, case No. 06-CH-66. The complaint sought discipline of Prusak for his conduct as a lawyer in nine cases. The complaint alleged ineffective assistance, conflict of interest, failure to adequately supervise an associate, neglect of a criminal appeal, misrepresentations, failure to promptly refund an unearned fee, and incompetence. The State had no objection to the admission of the complaint, subject to the understanding that these were merely allegations against Prusak that had not yet been ruled on.

¶ 23 After admitting the ARDC complaint in evidence, the trial court heard arguments and then made its own observations about the evidence it had heard on the amended motion to withdraw the guilty pleas. The court began its remarks by expressing its displeasure Prusak was not in attendance as well as Prusak's overall representation of defendant in this case. However,

the court noted defendant had the opportunity to move for a continuance before pleading guilty, so that Prusak could be present at that hearing, but defendant had declined that opportunity. The court observed defendant had been admonished regarding the minimum and maximum sentences prior to pleading guilty. Ultimately, the court denied the amended motion to withdraw the guilty pleas. The court then set the amended motion for reconsideration of the sentence for a September 2, 2007, hearing.

¶ 24 F. Hearing on Motion to Reconsider Sentence

¶ 25 On September 2, 2007, the trial court denied defendant's amended motion for reconsideration of sentence, finding the vehicle defendant was driving was particularly dangerous, defendant was driving under the influence of cocaine, and defendant had prior incidents involving cocaine possession.

¶ 26 G. Direct Appeal

¶ 27 On direct appeal, defendant argued (1) his guilty pleas were invalid because his defense counsel had been ineffective and (2) his sentence was excessive. This court affirmed, finding, *inter alia*, (1) defendant failed to show his counsel's allegedly deficient performance prejudiced him and (2) the trial court did not abuse its discretion in sentencing him to 28 years in prison. *People v. Ellis*, No. 4-08-0662, slip order at 1 (May 5, 2010) (unpublished order under Supreme Court Rule 23).

¶ 28 H. Postconviction Petition

¶ 29 On April 8, 2011, defendant filed a postconviction petition, arguing (1) his trial counsel was ineffective for (a) advising him he would receive a three to four year sentence, (b) failing to discuss a deal or sentencing cap with the State, (c) failing to conduct pretrial discovery,

and (d) failing to communicate or effectively represent him; and (2) his sentence was disproportionate to the nature of his offense where (a) the weather conditions were poor, his driving was not reckless, and he had a limited criminal record, (b) another person with a more extensive criminal history been convicted in the same court under the same circumstances and received a five-year sentence, and (c) he "received the sentencing guidelines of a Class X sentence (6-30 years) for a [C]lass 2 charge."

¶ 30 On June 3, 2011, the trial court dismissed defendant's postconviction petition as frivolous and patently without merit. Thereafter, defendant appealed the court's decision, and OSAD was appointed to represent him.

¶ 31 On June 8, 2012, OSAD moved to withdraw, 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, who is currently in prison. On its own motion, this court granted defendant leave to file additional points and authorities by August 1, 2012. Defendant did so, and the State filed a responding brief. After reviewing the record consistent with our responsibility under *Finley*, we agree with OSAD.

¶ 32 II. ANALYSIS

¶ 33 OSAD moves to withdraw pursuant to *Finley*, arguing no meritorious arguments can be raised on appeal. We agree.

¶ 34 A. Defendant's Postconviction Petition

¶ 35 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2010)) establishes a three-stage process for adjudicating a postconviction petition. *People v. Beaman*, 229 Ill. 2d 56, 71, 890 N.E.2d 500, 509 (2008). Here, defendant's petition was dismissed at the

first stage of postconviction proceedings. At the first stage, the trial court must review the postconviction petition and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010). "[A] *pro se* petition seeking postconviction relief under the Act for a denial of constitutional rights may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 11-12, 912 N.E.2d 1204, 1209 (2009).

¶ 36 "The purpose of a post-conviction proceeding is to permit inquiry into constitutional issues involved in the original conviction and sentence that were not, and could not have been, adjudicated previously on direct appeal." *People v. Harris*, 206 Ill. 2d 1, 12, 794 N.E.2d 314, 323 (2002). "Issues that were raised and decided on direct appeal are barred by the doctrine of *res judicata*. [Citations.] Issues that could have been presented on direct appeal, but were not, are waived." *Harris*, 206 Ill. 2d at 12-13, 794 N.E.2d at 323. " '[W]here *res judicata* and forfeiture preclude a defendant from obtaining relief, such a claim is necessarily "frivolous" or "patently without merit." ' " *People v. Alcozer*, 241 Ill. 2d 248, 258-59, 948 N.E.2d 70, 77 (2011) (quoting *People v. Blair*, 215 Ill. 2d 427, 445, 831 N.E.2d 604, 616 (2005)). An otherwise meritorious claim has no basis in law if *res judicata* or forfeiture bar the claim. *Blair*, 215 Ill. 2d at 445, 831 N.E.2d at 615-16. Our review of the first-stage dismissal of a postconviction petition is *de novo*. *People v. Ligon*, 239 Ill. 2d 94, 104, 940 N.E.2d 1067, 1074 (2010).

¶ 37 B. Ineffective-Assistance-of-Counsel Claims

¶ 38 In his postconviction petition, defendant argued his trial counsel was ineffective for (1) advising him he would receive a three to four year sentence, (2) failing to discuss a deal or

sentencing cap with the State, (3) failing to conduct pretrial discovery, and (4) failing to communicate or effectively represent him.

¶ 39 Claims of ineffective assistance of counsel may be raised in a postconviction petition. See *People v. Brown*, 236 Ill. 2d 175, 185, 923 N.E.2d 748, 754 (2010) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). In the petition, a defendant "must show counsel's performance was deficient and that prejudice resulted from the deficient performance." *Brown*, 236 Ill. 2d at 185, 923 N.E.2d at 754. A petition alleging ineffective assistance of counsel may not be dismissed at the first stage where (1) counsel's performance arguably fell below an objective standard of reasonableness and (2) prejudice arguably resulted. *Brown*, 236 Ill. 2d at 185, 923 N.E.2d at 754.

¶ 40 In this case, defendant claims he was rendered ineffective assistance because Prusak told him he was likely to receive a three to four year sentence. However, that issue was previously raised and decided on direct appeal. See *Ellis*, No. 4-08-0662, slip order at 34. Accordingly, that issue is barred from consideration in the postconviction context by *res judicata*. *Harris*, 206 Ill. 2d at 12, 794 N.E.2d at 323.

¶ 41 Defendant next alleged Prusak provided ineffective assistance by failing to discuss a plea deal or sentencing cap with the State. However, this issue was also previously raised and decided on direct appeal. See *Ellis*, No. 4-08-0662, slip order at 36. Thus, our review of this issue is also barred by *res judicata*.

¶ 42 Defendant additionally alleged Prusak failed to "conduct any investigation and interview witnesses" and did not "obtain and review records." However, those issues could have been presented on direct appeal but were not. Thus, review of these issues is forfeited. *Harris*,

206 Ill. 2d at 13, 794 N.E.2d at 323. Forfeiture aside, defendant did not specify which witnesses Prusak failed to investigate or what records he failed to obtain. "[T]he failure to either attach the necessary 'affidavits, records, or other evidence' or explain their absence is 'fatal' to a post-conviction petition [citation] and by itself justifies the petition's summary dismissal [citations]." *People v. Collins*, 202 Ill. 2d 59, 66, 782 N.E.2d 195, 198 (2002). Here, defendant did not attach witness statements or copies of those records to his petition. Such failure is fatal to his postconviction petition.

¶ 43 Finally, defendant argues Prusak failed to adequately communicate with him regarding the merits of the case. However, this issue too was raised and decided in defendant's direct appeal. *Ellis*, No. 4-08-0662, slip order at 38. As previously stated, such issues are therefore barred by *res judicata*. As a result, no meritorious argument can be made in this court defendant was provided ineffective assistance of counsel.

¶ 44 C. Proportionate-Penalties Claim

¶ 45 In his postconviction petition, defendant alleges his sentence violates the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11) because (1) the weather conditions were poor, his driving was not reckless, and he had a limited criminal record; (2) another person with a more extensive criminal history was convicted in the same court under the same circumstances and received a five-year sentence; and (3) he "received the sentencing guidelines of a Class X sentence (6-30 years) for a [C]lass 2 charge." We disagree.

¶ 46 On direct appeal, defendant argued his sentence was excessive because he had only one prior felony conviction and inclement weather contributed to the crash. This court found defendant's sentence was not excessive. *Ellis*, No. 4-08-0662, slip order at 41. Thus, the issue is

barred from relitigation by *res judicata*.

¶ 47 Defendant also alleged his sentence was disproportionate to the sentence another similarly situated defendant received. However, this issue could have been presented on direct appeal but was not. Thus, review of the issue is forfeited. Absent forfeiture, a comparative review of defendant's sentence would not be appropriate in this case. See *People v. Johnson*, 206 Ill. 2d 348, 379, 794 N.E.2d 294, 313 (2002) ("Only when one defendant is sentenced to death while his codefendant or accomplice, convicted of the same crime, receives a lesser sentence will we engage in a comparative review of disparate sentences."); *People v. Fern*, 189 Ill. 2d 48, 62, 723 N.E.2d 207, 214 (1999).

¶ 48 Finally, defendant alleged he "received the sentencing guidelines of a Class X sentence (6-30 years) for a [C]lass 2 charge." We disagree. Defendant pleaded guilty to aggravated DUI (625 ILCS 5/11-501(d)(1)(F) (West 2006)), which is a Class 2 felony punishable by a prison term of between 6 years and 28 years where, as here, the violation resulted in the deaths of 2 persons (625 ILCS 5/11-501(d)(2) (West 2006)). The trial court sentenced defendant to 28 years, which is within the applicable range. Accordingly, defendant's argument fails.

¶ 49 D. Section 122-2.1(a) Requirement

¶ 50 Finally, OSAD argues no meritorious issue can be raised on appeal regarding the timing of the dismissal of defendant's petition. We agree.

¶ 51 At the first stage of a postconviction proceeding, the trial court must independently review the petition within 90 days and determine whether it is frivolous or patently without merit. *People v. Edwards*, 197 Ill. 2d 239, 244, 757 N.E.2d 442, 445 (2001). Section 122-2.1(a) provides the trial court "shall examine" and "enter an order" on a postconviction petition within

90 days after it is filed. 725 ILCS 5/122-2.1(a) (West 2010). Here, the court's June 3, 2011, dismissal of defendant's petition came within 90 days of its April 8, 2011, filing.

¶ 52 III. CONCLUSION

¶ 53 After reviewing the record consistent with our responsibilities under *Finley*, we agree with OSAD no meritorious issues can be raised on appeal, grant OSAD's motion to withdraw as counsel for defendant, and affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 54 Affirmed.

¶ 55 JUSTICE APPLETON, specially concurring.

¶ 56 I filed a dissent in the direct appeal from defendant's conviction. However, as to the issues raised in the postconviction petition and the appeal from its denial, I concur as the arguments concerning the petition are essentially precluded by the law of the case.