2012 IL App (4th) 110705-U

Filed 6/6/12

NO. 4-11-0705

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
JOHN LEWIS,	)	No. 06CF41
Defendant-Appellant.	)	
	)	Honorable
	)	Katherine M. McCarthy,
	)	Judge Presiding.

PRESIDING JUSTICE TURNER delivered the judgment of the court.
Justices Steigmann and McCullough concurred in the judgment.

ORDER

¶ 1 *Held:* Where the State presented evidence that gave rise to a reasonable inference defendant was wearing the leather jacket at the time of the accident and the jacket contained a loaded handgun, defendant's ineffective-assistance-of-counsel claims based on the argument the armed-violence statute did not apply to the circumstances of his case were without merit.

¶ 2 Since defendant's affidavit suggests trial counsel was aware defendant was incarcerated on another matter and counsel failed to timely move to withdraw defendant's bond so defendant could receive sentencing credit, defendant made a substantial showing of a constitutional violation based on ineffective assistance of counsel.

¶ 3 In September 2010, defendant, John Lewis, filed a *pro se* postconviction petition, which counsel later amended in April 2011. The amended petition alleged, *inter alia*, defendant was denied effective assistance of (1) trial counsel because trial counsel failed to (a) challenge the applicability of the armed-violence statute and (b) file a written motion to withdraw defen-

dant's bond once defendant was incarcerated on another matter and (2) appellate counsel due to counsel's failure to raise trial counsel's ineffectiveness on direct appeal. In June 2011, the State filed a motion to dismiss defendant's amended postconviction petition. After a July 2011 hearing, the Macon County circuit court entered a written order, granting the State's motion to dismiss.

¶ 4 Defendant appeals, asserting the trial court erred by dismissing his postconviction petition because (1) the State failed to prove defendant was guilty of armed violence beyond a reasonable doubt, (2) trial and appellate counsel were ineffective for failing to raise the sufficiency of the evidence, and (3) trial and appellate counsel were ineffective for failing to raise an issue regarding defendant's failure to surrender his bond when he was in custody on another offense. We affirm in part, reverse in part, and remand the cause for further proceedings.

¶ 5 I. BACKGROUND

¶ 6 On December 27, 2005, defendant was arrested on several charges. The next day, defendant was released on bond. On January 9, 2006, the State brought six charges against defendant for his actions on December 27, 2005, including the armed-violence count (720 ILCS 5/33A-2(a) (West 2004)) at issue in this appeal, and two charges for defendant's actions in February 2005. The latter two charges were eventually severed.

¶ 7 On November 30, 2006, the trial court held a status hearing in this case. The docket entry for that date does not state what was addressed at the hearing, and the record on appeal lacks a report of proceedings under Illinois Supreme Court Rule 323 (eff. Dec. 13, 2005) for that proceeding.

¶ 8 On August 30, 2007, defendant filed a written motion to withdraw his bond,

noting he had been incarcerated on unrelated felony matters and had been sentenced to the Department of Corrections (DOC). The motion listed neither the date he returned to custody nor the date he was sentenced to DOC. On November 8, 2007, the trial court heard defendant's motion to revoke his bond. The State did not object to the revocation, and no custody or sentencing dates were discussed.

¶ 9 The trial court held defendant's bench trial in December 2007 on the six charges. The evidence presented at trial that is pertinent to the issues on appeal are discussed in the analysis section of this order. The court found defendant guilty of several of the charges. However, at an August 13, 2008, sentencing hearing, the court sentenced defendant only on the armed-violence conviction due to the one-act, one-crime rule. Defendant received a sentence of 15 years' imprisonment and was given sentencing credit for his time in custody on December 27 and 28, 2005, and from November 8, 2007, to August 13, 2008. Defendant filed a motion to reconsider his sentence, asserting his sentence was excessive. After an October 2008 hearing, the court denied defendant's motion to reconsider.

¶ 10 Defendant appealed, raising issues related to his waiver of the right to a jury trial. This court affirmed the trial court's judgment. *People v. Lewis*, No. 4-08-0791 (Nov. 16, 2009) (unpublished order under Supreme Court Rule 23). In March 2010, the supreme court denied defendant's petition for leave to appeal. *People v. Lewis*, 236 Ill. 2d 526, 930 N.E.2d 413 (2010).

¶ 11 On September 22, 2010, defendant filed a *pro se* postconviction petition. The petition was not presented to the trial court until December 30, 2010, at which time the court appointed defendant counsel due to the passage of the 90-day period. See 725 ILCS 5/122-2.1(a) (West 2010). In April 2011, defense counsel filed an amended postconviction petition, asserting

defendant was denied effective assistance of (1) trial counsel by counsel's (a) failure to challenge the applicability of the armed-violence statute to the circumstances of this case, (b) failure to file a written motion to withdraw defendant's bond once defendant was incarcerated on a different matter, and (c) advice to waive defendant's right to a jury trial when no negotiations were contemplated and (2) appellate counsel for failing to raise the aforementioned issues on direct appeal. Attached to the petition was an affidavit of defendant. In the affidavit, defendant stated counsel failed to file a written motion to withdraw his bond for 274 days after an oral motion was ordered reduced to writing and that failure cost defendant 344 days of incarceration credit. Defense counsel also filed a memorandum of law in support of the amended petition, asserting trial counsel had made an oral motion to surrender defendant's bond on November 30, 2006, and the court ordered the motion to be reduced to writing. Attached to the memorandum was an affidavit of William Godfrey, who had testified at defendant's trial and was one of the first people on the scene at defendant's car accident that led to the charges in this case.

¶ 12 In June 2011, the State filed a motion to dismiss defendant's amended postconviction petition, asserting defendant's allegations were insufficient as a matter of law to entitle him to a hearing on the petition. On July 25, 2011, the trial court held a hearing on the State's motion to dismiss and took the matter under advisement. On July 27, 2011, the court entered a written order, granting the State's motion to dismiss. Specifically, the court found defendant's argument regarding the applicability of the armed-violence statute was without merit and defendant's bond argument did not relate to the fairness of defendant's trial.

¶ 13 On November 7, 2011, defendant filed a motion for leave to file a late notice of appeal, which was timely filed under Illinois Supreme Court Rule 606(c) (eff. Mar. 20, 2009).

See Ill. S. Ct. R. 651(d) (eff. Dec. 1, 1984) (providing the supreme court rules governing criminal appeals apply to appeals in postconviction proceedings). This court granted defendant's request and the late notice of appeal was filed on November 14, 2011. Accordingly, this court has jurisdiction under Illinois Supreme Court Rule 651(a) (eff. Dec. 1, 1984).

¶ 14 II. ANALYSIS

¶ 15 A. Standard of Review

¶ 16 The Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/art. 122 (West 2010)) provides a remedy for defendants who have suffered a substantial violation of constitutional rights at trial. *People v. Pendleton*, 223 Ill. 2d 458, 471, 861 N.E.2d 999, 1007 (2006). In cases not involving the death penalty, the Postconviction Act sets forth three stages of proceedings. *Pendleton*, 223 Ill. 2d at 471-72, 861 N.E.2d at 1007.

¶ 17 At the first stage, the trial court independently reviews the defendant's postconviction petition and determines whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010). If it finds the petition is frivolous or patently without merit, the court must dismiss the petition. 725 ILCS 5/122-2.1(a)(2) (West 2010). If the court does not dismiss the petition, it proceeds to the second stage, where, if necessary, the court appoints the defendant counsel. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1007. Defense counsel may amend the defendant's petition to ensure his or her contentions are adequately presented. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1007. Also, at the second stage, the State may file a motion to dismiss the defendant's petition or an answer to it. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1008. If the State does not file a motion to dismiss or the court denies such a motion, the petition advances to the third stage, wherein the court holds a hearing at which the

defendant may present evidence in support of his or her petition. *Pendleton*, 223 Ill. 2d at 472-73, 861 N.E.2d at 1008. In this case, the State did file a motion to dismiss, and the court granted that motion.

¶ 18 With the second stage of the postconviction proceedings, the trial court is concerned merely with determining whether the petition's allegations sufficiently demonstrate a constitutional infirmity that would necessitate relief under the Postconviction Act. *People v. Coleman*, 183 Ill. 2d 366, 380, 701 N.E.2d 1063, 1071 (1998). At this stage, "the defendant bears the burden of making a substantial showing of a constitutional violation" and "all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true." *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008. The court reviews the petition's factual sufficiency as well as its legal sufficiency in light of the trial court record and applicable law. *People v. Alberts*, 383 Ill. App. 3d 374, 377, 890 N.E.2d 1208, 1212 (2008). However, our supreme court has emphasized that, when a petitioner's claims are based upon matters outside the record, the Postconviction Act does not intend such claims be adjudicated on the pleadings. *People v. Simms*, 192 Ill. 2d 348, 360, 736 N.E.2d 1092, 1105 (2000). At a dismissal hearing, the court is prohibited from engaging in any fact finding. *Coleman*, 183 Ill. 2d at 380-81, 701 N.E.2d at 1071. Thus, the 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. *Coleman*, 183 Ill. 2d at 382, 701 N.E.2d at 1072. Additionally, we note partial dismissals at the second stage are proper. *People v. Cabrera*, 326 Ill. App. 3d 555, 564, 764 N.E.2d 532, 539 (2001). We review *de novo* the trial court's dismissal of a postconviction petition at the second stage. *Pendleton*, 223 Ill. 2d at 473,

861 N.E.2d at 1008.

¶ 19 B. Sufficiency of the Evidence

¶ 20 Defendant first asserts the State failed to prove him guilty beyond a reasonable doubt of armed violence. However, defendant has forfeited this issue for several reasons. First, defendant failed to raise this issue in his amended postconviction petition, which only addressed matters of ineffective assistance of counsel. See *People v. Jones*, 211 Ill. 2d 140, 148, 809 N.E.2d 1233, 1239 (2004) (holding a defendant cannot raise an issue for the first time on appeal from the dismissal of a postconviction petition). Second, defendant could have raised this issue on direct appeal and did not. See *People v. McDonald*, 364 Ill. App. 3d 390, 392, 846 N.E.2d 960, 963 (2006) (stating issues that could have been presented on direct review are forfeited). Thus, we will only address this issue in the context of the ineffective-assistance-of-counsel claim.

¶ 21 C. Ineffective Assistance of Counsel

¶ 22 Defendant raises claims of ineffective assistance of trial and appellate counsel. This court analyzes such claims under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Evans*, 186 Ill. 2d 83, 93, 708 N.E.2d 1158, 1163 (1999). To obtain reversal under *Strickland*, a defendant must prove (1) his counsel's performance failed to meet an objective standard of competence and (2) counsel's deficient performance resulted in prejudice to the defendant. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163.

¶ 23 To satisfy the deficiency prong of *Strickland*, the defendant must demonstrate counsel made errors so serious and counsel's performance was so deficient that counsel was not functioning as "counsel" guaranteed by the sixth amendment (U.S. Const., amend. VI). *Strickland*, 466 U.S. at 687. Further, the defendant must overcome the strong presumption the

challenged action or inaction could have been the product of sound trial strategy. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163. To satisfy the prejudice prong, defendant must show "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. Stated differently, the defendant must prove a reasonable probability exists that, but for counsel's unprofessional errors, the proceeding's result would have been different. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163-64. The *Strickland* Court noted that, when a case is more easily decided on the ground of lack of sufficient prejudice rather than that counsel's representation was constitutionally deficient, the court should do so. *Strickland*, 466 U.S. at 697.

¶ 24 1. *Sufficiency of the Evidence*

¶ 25 Defendant first asserts both his trial and appellate counsel were ineffective for failing to challenge the applicability of the armed-violence statute to the facts of this case or, in other words, the sufficiency of the evidence as to that charge. Specifically, defendant argues no evidence shows defendant possessed the gun before, during, or after the accident. The State disagrees.

¶ 26 "A person commits armed violence when, while armed with a dangerous weapon, he commits any felony defined by Illinois Law" except for those crimes enumerated, which are not at issue here. 720 ILCS 5/33A-2(a) (West 2004). For the purposes of the armed-violence statute, a person is armed with a dangerous weapon "when he or she carries on or about his or her person or is otherwise armed with a Category I, Category II, or Category III weapon." 720 ILCS 5/33A-1(c)(1) (West 2004). Here, the State charged defendant knowingly and unlawfully possessed more than 30 grams of a substance containing cannabis while armed with a handgun, a

category I weapon.

¶ 27 Contrary to defendant's assertions, the record shows the trial judge could have reasonably inferred from the State's evidence the gun was in defendant's jacket when the accident occurred. Godfrey testified he and a paramedic were the first to approach defendant's vehicle shortly after the accident occurred. Godfrey, a firefighter, got in the backseat of defendant's vehicle to help stabilize defendant's head. When defendant tried to take his jacket off, Godfrey helped defendant remove the leather jacket defendant was wearing. Godfrey described the jacket as a "very heavy leather jacket." After removing the coat, Godfrey set the jacket on the backseat next to him. Police officer Thomas Butts testified he was the officer that searched the leather jacket, which was still in the vehicle, and discovered a loaded handgun "within" the jacket. No matter where the gun was located within the jacket, defendant clearly would have been armed with a dangerous weapon for the purpose of the armed-violence statute when he was wearing the jacket because the gun would have been "on or about his person." See 720 ILCS 5/33A-1(c)(1) (West 2004). Additionally, we note that, in their briefs, both parties discredit the testimony of defendant's witness, Jose Perales-Ard, who testified he was a passenger in defendant's vehicle at the time of the accident and placed the handgun in defendant's jacket pocket before fleeing the scene.

¶ 28 This case is distinguishable from both *People v. Melgoza*, 231 Ill. App. 3d 510, 532, 595 N.E.2d 1261, 1277 (1992), and *People v. King*, 155 Ill. App. 3d 363, 369-70, 507 N.E.2d 1285, 1289 (1987), where the reviewing courts found the facts did not show the defendant was armed with a dangerous weapon. In those cases, the guns were not in an article of clothing recently worn by the defendant. See *Melgoza*, 231 Ill. App. 3d at 532, 595 N.E.2d at

1277 (gun recovered from backseat of the defendant's car); *King*, 155 Ill. App. 3d at 368, 507 N.E.2d at 1288 (unloaded pistol on a table in the defendant's apartment).

¶ 29 Accordingly, since the record contradicts defendant's assertion the State's evidence failed to show defendant possessed the handgun, defendant cannot establish the prejudice prong of the *Strickland* test. Thus, the trial court properly dismissed the ineffective-assistance-of-counsel claims related to the applicability of the armed-violence statute.

¶ 30 2. *Withdrawal of Bond*

¶ 31 Defendant also asserts his trial counsel was ineffective for failing to earlier move to withdraw defendant's bond and his appellate counsel was ineffective for failing to raise the issue on appeal. The State asserts the record does not support defendant's assertion defense counsel made an oral motion to revoke the bond in November 2006 and, regardless of the record, defendant cannot establish the first prong of *Strickland* because any error did not deprive him of a fair trial.

¶ 32 An Illinois court has held trial counsel may be found ineffective for failing to file a motion to withdraw bond, which leads to the defendant being deprived of statutory credit under section 5-8-7(b) of the Unified Code of Corrections (730 ILCS 5/5-8-7(b) (West 2004) (now 730 ILCS 5/5-4.5-100(b) (West 2010))). See *People v. Centeno*, 394 Ill. App. 3d 710, 714, 916 N.E.2d 70, 74 (2009). Other Illinois courts have recognized the possibility of finding counsel ineffective for failing to timely file a motion to withdraw bond. See *People v. Miller*, 2011 IL App (5th) 090679, ¶¶ 14-15, 960 N.E.2d 1286, 1289 (recognizing the defendant's sentencing-credit issue was dependent upon a finding that counsel was ineffective and the defendant had forfeited such an issue by failing to include it in his postconviction petition)*; People v. Nesbit*,

398 Ill. App. 3d 200, 215, 924 N.E.2d 517, 530 (2010) (noting that, due to the inadequate record about when counsel learned of the defendant's incarceration, his ineffective-assistance-of-counsel claim would best be presented in a postconviction matter). Moreover, the State fails to cite any authority beyond *Strickland*'s explanation of when prejudice exists for purposes of satisfying the second prong for its assertion ineffective-assistance-of-counsel claims are limited to claims that affect defendant's trial. Under defendant's argument, sentencing matters could not give rise to an ineffective-assistance-of-counsel claim since such do not affect the fairness of defendant's trial. However, our supreme court has recognized ineffective-assistance claims can arise at sentencing. *People v. Patrick,* 2011 IL 111666, ¶ 38, 960 N.E.2d 1114, 1122-23 (2011). Accordingly, we find defendant's argument can be raised as an ineffective-assistance-of-counsel claim.

¶ 33 The *Centeno* court explained the trial counsel's deficiency as follows:

> "When a defendant is out on bond pursuant to one offense and is subsequently arrested and returned to custody on a second offense, the defendant is returned to custody on the initial offense when his bond is withdrawn or revoked. [Citations.] Thus, when a defendant is brought into custody on the second offense and then surrenders in exoneration of the bond he posted on a previous offense, he is in simultaneous pretrial custody for both offenses. [Citation.] Under these circumstances, the defendant is entitled to section 5-8-7(b) presentence credit for both offenses. [Citation.]
>
> In an instance where defense counsel is aware that the defendant is in custody in another jurisdiction, '[i]t behoove[s]

> defense counsel to move to withdraw the bond posted in the instant case in order to allow the defendant to earn credit against his eventual sentences in the instant case at the same time that he earned credit against his sentence in the [other jurisdiction].' [Citation.]" *Centeno*, 394 Ill. App. 3d at 713-14, 916 N.E.2d at 73.

In *Centeno*, 394 Ill. App. 3d at 714, 916 N.E.2d at 74, the court concluded the defendant was prejudiced by the failure of his counsel to move to withdraw the bond since the defendant would have received sentencing credit if the bond had been withdrawn. It awarded the defendant sentencing credit from the time the public defender was made aware of the defendant's incarceration to the date of sentencing. *Centeno*, 394 Ill. App. 3d at 715, 916 N.E.2d at 74.

¶ 34 In this case, defendant states in his affidavit his counsel failed to file a written motion to withdraw his bond for 274 days after an oral motion was ordered reduced to writing and that failure cost defendant 344 days of incarceration credit. The presentence investigation report states defendant was sentenced to the DOC on another matter on April 20, 2007, which was almost four months before trial counsel moved to withdraw defendant's bond. Thus, while the record does not confirm defendant made an oral motion to withdraw his bond, it does not refute defendant's assertion and, in fact, confirms defendant's allegation he was in custody on an unrelated matter and trial counsel failed to seek the withdrawal of defendant's bond in a timely manner. At the second stage of the postconviction proceedings, we must take "all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true." See *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008. Here, the record does not rebut defendant's ineffective-assistance-of-counsel allegations related to the bond withdrawal. Accordingly, we find defendant

has made a "substantial showing of a constitutional violation" based on ineffective assistance of both trial and appellate counsel related to trial counsel's failure to timely move to withdraw defendant's bond. See *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008.

¶ 35 Since partial dismissals are allowed at the second stage of the postconviction proceedings (*Cabrera*, 326 Ill. App. 3d at 564, 764 N.E.2d at 539), we remand this issue only to the trial court for a third-stage evidentiary hearing.

¶ 36 III. CONCLUSION

¶ 37 For the reasons stated, we reverse the Macon County circuit court's judgment that dismisses the ineffective-assistance-of-counsel claims in defendant's amended postconviction petition that relate to defendant's bond withdrawal, affirm the court's judgment in all other respects, and remand for further proceedings. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 38 Affirmed in part and reversed in part; cause remanded.