2013 IL App (4th) 120799-U

NO. 4-12-0799

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
November 8, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
TINA S. TILLEY,	)	No. 09CF40
Defendant-Appellant.	)	
	)	Honorable
	)	Jennifer H. Bauknecht,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Steigmann and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: Where defendant's *pro se* postconviction petition failed to raise an arguably meritorious claim of ineffective assistance of trial or appellate counsel, the trial court did not err in summarily dismissing the petition.

¶ 2 In November 2009, the trial court found defendant, Tina S. Tilley, guilty of unlawful participation in methamphetamine production. In December 2009, the court sentenced her to 12 years in prison. In May 2012, defendant filed a *pro se* postconviction petition, which the court summarily dismissed as frivolous and patently without merit.

¶ 3 On appeal, defendant argues the trial court erred in summarily dismissing her postconviction petition. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In February 2009, officers from the Livingston County Proactive Unit and the

Illinois State Police Methamphetamine Response Team (Meth Response Team) conducted a search of a residence in Dwight, Illinois, belonging to defendant and her husband, Jimmy Tilley, after obtaining Jimmy's consent. In the course of the search, officers discovered the remnants of a meth lab in defendant and Jimmy's bedroom. Numerous items associated with the manufacture and use of methamphetamine were discovered in the bedroom. A large trash bag contained, among other things, a smaller gift bag containing a chunky powder that field-tested positive for methamphetamine. The powder weighed 391.1 grams. A sample was retained for later testing. A laboratory report indicated the sample weighed 25.3 grams and tested positive for methamphetamine. Officers seized and later destroyed the various hazardous materials used in or produced by the manufacture of methamphetamine, including the powder not preserved for testing.

¶ 6 Jimmy waived his *Miranda* rights (see *Miranda v. Arizona*, 384 U.S. 436 (1966)) and gave an interview at the residence. Jimmy stated he learned how to manufacture methamphetamine from his brother and sister in 2008. He described the process by which he manufactured methamphetamine and reported he had produced methamphetamine approximately 10 times at several locations, including his home. He later drafted and signed a handwritten statement regarding his activities during the day preceding the search. He reported he had "cooked" 3 boxes of pseudoephedrine pills and produced approximately 1 1/2 grams of methamphetamine.

¶ 7 Defendant was arrested and taken to jail, where she waived her *Miranda* rights, gave an interview, and drafted and signed a handwritten statement. In her interview, defendant stated she had been purchasing pseudoephedrine pills for several months for Jimmy to use in his

manufacture of methamphetamine.

¶ 8 In February 2009, the State charged defendant by information with one count of unlawful participation in methamphetamine production (720 ILCS 646/15(a)(2)(C) (West 2008)), alleging she knowingly participated in the manufacture of 100 grams or more but less than 400 grams of a substance containing methamphetamine. The State also filed a similar charge against Jimmy. Defendant pleaded not guilty.

¶ 9 In August and November 2009, defendant and Jimmy were tried jointly in a bench trial. Illinois State Police Investigator Edward Woods testified he responded to the Tilley residence. He stated the smell of a methamphetamine lab was "very overwhelming." Woods interviewed defendant, and she stated Jimmy's brother and sister taught him how to manufacture methamphetamine in March 2008. Later that year, defendant found different-sized lids, hoses, and methamphetamine materials that led her to believe Jimmy was manufacturing methamphetamine. She also stated she knew the pseudoephedrine pills she purchased were to be used in manufacturing methamphetamine.

¶ 10 Special agent Courtney Mauser of the Meth Response Team testified at length about the powder he observed in the gift bag. Initially, Mauser described it as "a white and black chunky substance that field tested positive for the presence of methamphetamine." He testified he took what he considered a "characteristic sample" to use in testing. He agreed with the State's characterization of the powder as "some sort of a white, powdery substance." Mauser clarified the powder was produced in the course of the methamphetamine-manufacturing process. He agreed with the State's characterization of what he observed in the gift bag as "kind of a pile of substance."

¶ 11 Using his assigned digital scale, which he had checked for accuracy, Mauser weighed the powdery substance and the gift bag, which totaled 483.5 grams. As the weight of the bag was 92.4 grams, the substance weighed 391.1 grams. Mauser stated he took a representative sample by placing the substance in a 30-milliliter glass vial. The vial was then capped, placed into a plastic bottle, and then both were placed into an airtight, vacuum-sealed plastic bag. The remaining substance was placed into a bucket, covered in vermiculite, and sealed. It was then transported to district headquarters in a hazardous materials container and destroyed by a licensed hazardous materials contractor.

¶ 12 On cross-examination, Mauser agreed with Jimmy's counsel's characterization of the powder as "a white, chunky substance with black chunks." On cross-examination by defendant's attorney, he stated "what was found was not finished product; it was a substance containing methamphetamine, which is all of the chemicals mixed together." He stated the powder he found could be reused to produce more methamphetamine. On redirect, he agreed with the State's characterization of the powder as "a white substance" with "some black in it" and reiterated that the powder was not methamphetamine in its finished state.

¶ 13 Illinois State Police master sergeant Greg Lindemulder testified it was standard operating procedure to test the substance, weigh it and send it to the lab, and then discard the rest into a hazardous materials container. Lindemulder stated the excess substance has to be discarded because it could not be kept in the vault due to the "high volume of chemicals" therein.

¶ 14 Defendant did not testify. Following closing arguments, the trial court found her guilty. Thereafter, defendant filed a motion for a new trial, which the court denied. In December 2009, the court sentenced defendant to 12 years in prison and ordered her to pay various fines

and fees. In February 2010, the court denied defendant's motion to reconsider sentence.

¶ 15 Defendant appealed, arguing the State failed to prove the mass of substance containing methamphetamine beyond a reasonable doubt. This court disagreed, finding the State proved she participated in manufacturing between 100 and 400 grams of a substance containing methamphetamine. *People v. Tilley*, 2011 IL App (4th) 100105, ¶ 11, 958 N.E.2d 1123.

¶ 16 In May 2012, defendant filed a *pro se* petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2012)). Defendant alleged (1) defense counsel was ineffective in failing to file a timely motion to preserve evidence; (2) counsel was ineffective in failing to properly investigate and utilize available evidence in the presentation of an affirmative defense; (3) her sentence violated her constitutional rights against cruel and unusual punishment; and (4) appellate counsel was ineffective in failing to supplement the record with a photo of the seized substances and in failing to raise the previously stated issues.

¶ 17 In August 2012, the trial court summarily dismissed defendant's petition, finding it frivolous and patently without merit. The court found the first three issues could have been raised on direct appeal and were procedurally defaulted. The court also found the claim of ineffective assistance of appellate counsel failed to show counsel's performance was deficient or that prejudice resulted. This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 On appeal, defendant argues the trial court erred in summarily dismissing her postconviction petition. We disagree.

¶ 20 The Act "provides a method by which defendants may assert that, in the proceed-

ings which resulted in their convictions, there was a substantial denial of their federal and/or state constitutional rights." *People v. Wrice*, 2012 IL 111860, ¶ 47, 962 N.E.2d 934. A proceeding under the Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *People v. Beaman*, 229 Ill. 2d 56, 71, 890 N.E.2d 500, 509 (2008). The defendant must show she suffered a substantial deprivation of her federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008).

¶ 21 The Act establishes a three-stage process for adjudicating a postconviction petition. *Beaman*, 229 Ill. 2d at 71, 890 N.E.2d at 509. Here, defendant's petition was dismissed at the first stage. 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 2012). Our supreme court has held "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). A petition lacks an arguable legal basis when it is based on an indisputably meritless legal theory, such as one that is completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16, 912 N.E.2d at 1212. A petition lacks an arguable factual basis when it is based on a fanciful factual allegation, such as one that is clearly baseless, fantastic, or delusional. *Hodges*, 234 Ill. 2d at 16-17, 912 N.E.2d at 1212.

¶ 22 "In considering a petition pursuant to [section 122-2.1 of the Act], the [trial] court may examine the court file of the proceeding in which the petitioner was convicted, any action taken by an appellate court in such proceeding[,] and any transcripts of such proceeding." 725 ILCS 5/122-2.1(c) (West 2012); *People v. Brown*, 236 Ill. 2d 175, 184, 923 N.E.2d 748, 754

(2010). The petition must be supported by "affidavits, records, or other evidence supporting its allegations," or, if not available, the petition must explain why. 725 ILCS 5/122-2 (West 2012).

¶ 23 "Under the doctrine of *res judicata*, any issues the court considered on direct appeal are barred from being addressed in a postconviction proceeding." *People v. Snow*, 2012 IL App (4th) 110415, ¶ 30, 964 N.E.2d 1139. Any issues that could have been considered on direct appeal are deemed forfeited. *People v. Ligon*, 239 Ill. 2d 94, 103, 940 N.E.2d 1067, 1073 (2010). Our supreme court has noted "the doctrines of *res judicata* and forfeiture are relaxed where fundamental fairness so requires, where the forfeiture stems from the ineffective assistance of appellate counsel, or where the facts relating to the issue do not appear on the face of the original appellate record." *People v. English*, 2013 IL 112890, ¶ 22, 987 N.E.2d 371. Our review of the first-stage dismissal of a postconviction petition is *de novo*. *People v. Dunlap*, 2011 IL App (4th) 100595, ¶ 20, 963 N.E.2d 394.

¶ 24 A. Issue No. 1

¶ 25 In issue No. 1 of her postconviction petition, defendant alleged her trial counsel was ineffective for failing to file a motion to preserve evidence, which resulted in a violation of her rights to due process and confrontation. Defendant claimed she was deprived of the opportunity to determine if the seized substance was homogenous and to determine the weight and substance of the material via independent testing. The petition also alleged counsel should have attacked the constitutionality of section 15(a)(2)(C) of the Methamphetamine Control and Community Protection Act (720 ILCS 646/15(a)(2)(C) (West 2008)) because the phrase "substance containing methamphetamine" is too broad. Defendant also argued her rights to due process and confrontation were violated when the sentencing range depends on the weight of the

seized substance and Illinois State Police procedure is to destroy the methamphetamine byproduct because it is considered hazardous material.

¶ 26 Claims of ineffective assistance of counsel are evaluated under the two-pronged test set forth in *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 "if: (1) counsel's performance arguably fell below an objective standard of reasonableness; and (2) the petitioner was arguably prejudiced as a result." *Brown*, 236 Ill. 2d at 185, 923 N.E.2d at 754. A defendant must satisfy both prongs of the *Strickland* standard, and the failure to satisfy either prong precludes a finding of ineffective assistance of counsel. *People v. Houston*, 226 Ill. 2d 135, 144-45, 874 N.E.2d 23, 30 (2007).

¶ 27 Defendant's first two allegations of ineffectiveness center on the destruction of the seized substance and her claims that counsel should have sought to preserve the evidence and she was denied the opportunity to test the substance. However, "[w]hen evidence is only potentially useful, not material exculpatory evidence, a failure to preserve evidence does not violate due process unless the defendant can show bad faith by the State." *People v. Schroeder*, 2012 IL App (3d) 110240, ¶ 33, 969 N.E.2d 987. "Destroying hazardous material pursuant to a routine, well-intentioned policy cannot be bad faith." *People v. Gentry*, 351 Ill. App. 3d 872, 879, 815 N.E.2d 27, 33 (2004). At trial, Agent Mauser, who weighed the substance and preserved a sample to send to the lab, testified the remainder of the substance was destroyed due to the hazardous nature of methamphetamine. As the destruction of the remainder of the methamphetamine was

not done in bad faith considering the dangerous nature of the substance, defense counsel was not ineffective in not seeking to preserve the evidence. Also, defendant's claim that she was deprived of the chance to examine the substance to determine if the substance was homogenous did not rise to the level of ineffectiveness, as this court held the homogeneity of the substance was irrelevant. *Tilley*, 2011 IL App (4th) 100105, ¶ 15, 958 N.E.2d 1123.

¶ 28 Defendant's claim that counsel should have attacked the constitutionality of section 15(a)(2)(C) of the Methamphetamine Control and Community Protection Act because the phrase "substance containing methamphetamine" is too broad would also have failed. Our supreme court has found "by-product that contains traces of methamphetamine qualifies as a 'substance containing methamphetamine.' " *People v. McCarty*, 223 Ill. 2d 109, 125, 858 N.E.2d 15, 26 (2006); *People v. Stoffel*, 239 Ill. 2d 314, 331, 941 N.E.2d 147, 157 (2010) (applying *McCarty*); see also *People v. Haycraft*, 349 Ill. App. 3d 416, 428, 811 N.E.2d 747, 759 (2004) ("Methamphetamine is its ingredients; *i.e.*, anhydrous ammonia, pseudoephedrine, and lithium, combined in a mixture, whether cooked to its final, marketable form or not. The defendant combined the methamphetamine ingredients into the container; thus, the mixture in the container constituted a 'substance containing methamphetamine.' "). Accordingly, no constitutional argument could have been raised.

¶ 29 Moreover, defendant's claim that the State Police policy and procedure of destroying the methamphetamine byproduct violates her rights to due process and confrontation and she should only be sentenced on the amount sent to the lab is without merit considering the hazardous nature of the substance. Thus, trial counsel was not ineffective for failing to raising the issue at trial.

¶ 30 B. Issue No. 2

¶ 31 In issue No. 2 in her postconviction petition, defendant alleged defense counsel was ineffective in failing to properly investigate and present an affirmative defense. Defendant claimed she only purchased pseudoephedrine because Jimmy would become "extremely irritated and even violent." Defendant alleged she advised counsel of ongoing abuse by Jimmy but counsel failed to investigate, file a motion to sever, or raise an affirmative defense.

¶ 32 Here, defendant does not identify the affirmative defense she alleges counsel was ineffective in failing to raise and provides only vague descriptions of domestic abuse. The facts alleged also do not support the affirmative defenses of compulsion or necessity. See 720 ILCS 5/7-11 (West 2008) (compulsion); 720 ILCS 5/7-13 (West 2008) (necessity). The conduct described by Jimmy in the petition and its supporting documentation does not approach a threat of the imminent infliction of death or great bodily harm that would allow for a successful affirmative defense. Further, the trial court noted defendant has an extensive history of substance abuse and did not attempt to extricate herself from her relationship with Jimmy or seek help in doing so. The evidence indicates counsel's failure to raise an affirmative defense was not prejudicial as it would not have changed the outcome of the trial.

¶ 33 C. Issue No. 3

¶ 34 In issue No. 3 in her postconviction petition, defendant alleged her 12-year sentence violated constitutional prohibitions against cruel and unusual punishment. Defendant noted defense counsel attempted to have the sentence reduced but "failed to raise the basic constitutionality of imposing such a draconian sentence for essentially the crime of misusage of a[n] over-the-counter medication, by an individual with absolutely no criminal backround [*sic*]

aside from traffic tickets."

> "The eighth amendment to the United States Constitution states, 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' U.S. Const., amend. VIII. The cruel and unusual punishments clause has been interpreted to embody two distinct propositions. One 'prohibits the imposition of inherently barbaric punishments under all circumstances.' [Citation.] The other embodies a 'narrow proportionality principle,' which 'forbids *** extreme sentences that are grossly disproportionate to the crime.' (Internal quotation marks omitted.) [Citation.]" *People v. Gay*, 2011 IL App (4th) 100009, ¶ 14, 960 N.E.2d 1272.

Article I, section 11 of the Illinois Constitution (Ill. Const. 1970, art. I, § 11) provides, in part, as follows: "All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship."

¶ 35 Our supreme court has noted "manufacturing methamphetamine is a dangerous process involving toxic and combustible chemicals, and regardless of whether an individual successfully completes the methamphetamine manufacturing process, merely engaging in it poses a serious threat to public safety." *McCarty*, 223 Ill. 2d at 137-38, 858 N.E.2d at 33. In that case, the court found the sentence for manufacturing methamphetamine did not violate the proportionate-penalties clause of the Illinois Constitution. *McCarty*, 223 Ill. 2d at 138, 858 N.E.2d at 33.

¶ 36 Here, an argument that the sentencing statute at issue violated the proportionate-penalties clause would have been meritless. Moreover, given the dangers associated with methamphetamine production, a claim the sentence constituted cruel and unusual punishment likewise would have been rejected as without merit.

¶ 37 Defendant also claimed the trial court's assertion that the sentencing range was "draconian" shows the issue is meritorious. However, the court was responding to defense counsel's claim the sentencing range was "draconian." The court stated the "reason that this penalty is so draconian is that the production of methamphetamine has gone across the United States and has ruined not only families, it has ruined states. That is why the penalty is so severe." The sentencing range for defendant's crime was between 9 and 40 years in prison. 720 ILCS 646/15(a)(2)(C) (West 2008). Given the 12-year sentence was on the low end of the range, and considering the dangers associated with the manufacture of methamphetamine, a claim the sentence was unconstitutional or excessive would have been without merit.

¶ 38 D. Issue No. 4

¶ 39 In issue No. 4 in her postconviction petition, defendant alleged appellate counsel was ineffective for failing to raise the issues stated above as well as for failing to review and properly utilize certain evidence.

¶ 40 Claims that appellate counsel was ineffective are also evaluated under *Strickland*. *People v. Petrenko*, 237 Ill. 2d 490, 497, 931 N.E.2d 1198, 1203 (2010). "Appellate counsel is not required to brief every conceivable issue on appeal and may refrain from developing nonmeritorious issues without violating *Strickland*." *People v. Jones*, 219 Ill. 2d 1, 23, 845 N.E.2d 598, 610 (2006). Thus, "unless the underlying issue is meritorious, a defendant cannot be

said to have incurred any prejudice from counsel's failure to raise the particular issue on appeal." *People v. Edwards*, 195 Ill. 2d 142, 164, 745 N.E.2d 1212, 1224 (2001).

¶ 41 As the issues pertaining to trial counsel's alleged ineffectiveness have been found to be without merit, appellate counsel cannot be said to have been ineffective for not raising them on direct appeal. Moreover, defendant's claim appellate counsel was ineffective for not supplementing the appeal with a photo showing black chunks in the substance seized to support an argument the sample was not homogenous lacks an arguable basis in fact and law. As defendant's postconviction petition was insufficient to survive first-stage review, the trial court did not err in summarily dismissing it.

¶ 42 III. CONCLUSION

¶ 43 For the reasons stated, we 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.

¶ 44 Affirmed.