2014 IL App (4th) 120818-U

NO. 4-12-0818

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
December 1, 2014
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
HENRY L. ALLEN,	)	No. 08CF1194
Defendant-Appellant.	)	
	)	Honorable
	)	Robert L. Freitag,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Pope specially concurred in the judgment.
Justice Appleton concurred in part and dissented in part.

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 because no meritorious issues can be raised on appeal. 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 In October 2008, the State charged defendant, Henry L. Allen, with unlawful possession of a controlled substance—cocaine—with intent to deliver (720 ILCS 570/401(d)(i) (West 2008)) (count I) and unlawful possession of a controlled substance (720 ILCS 570/402(c)

(West 2008)) (count II). The indictment indicated defendant was eligible for mandatory Class X sentencing on count I and extended-term sentencing on count II.

¶ 5 A. Grand Jury Proceedings

¶ 6 On October 29, 2008, Mike Gray, a detective with the Bloomington police department, testified he reviewed materials related to defendant's October 17, 2008, arrest by LeRoy police. (A handwritten notation on the transcript states, "He was not on [*sic*] the scene of the crime.") Gray testified the officers initially talked with an informant, who indicated "defendant was coming to town to sell drugs." Officers located defendant and conducted a traffic stop. During the traffic stop, officers noticed a bulge under defendant's top lip and a struggle ensued when defendant attempted to swallow. The officers recovered six bags of cocaine from defendant's mouth. Defendant also had $180 in $20 bills, which officers believed to be proceeds from drug sales. Following Gray's testimony, the grand jury deliberated and returned a two-count bill of indictment.

¶ 7 B. Motion "To Quash and Suppress"

¶ 8 In January 2009, the trial court held a hearing on defendant's motion "to quash arrest and suppress evidence." Defendant argued the search of his mouth exceeded the parameters of a *Terry* stop (*Terry v. Ohio*, 392 U.S. 1 (1968)) and was conducted without consent or probable cause. Defendant's evidence consisted of the testimonies of Officer Jason Williamson and Deputy Jason Tuttle.

¶ 9 Williamson testified he was working as a police officer with the LeRoy police department on October 17, 2008. During a driving under the influence (DUI) arrest, Williamson was approached by Brian Fromhertz, whom Williamson knew from prior contacts. Although Fromhertz had not previously served as an informant, he expressed interest in setting up a sting.

Fromhertz suggested he was going to call his drug dealer and request a cocaine delivery. Since Williamson was making a DUI arrest, he asked Fromhertz to discuss it with him later. When Williamson arrived at the police station to continue processing the DUI arrest, Fromhertz was there waiting for him and repeated his suggestion. Again, Williamson told Fromhertz to wait so they could discuss Fromhertz's proposal later. Approximately 20 or 30 minutes later, Fromhertz called Williamson and stated he had called his dealer in Bloomington, who was on his way to LeRoy to deliver drugs to Fromhertz. Since Williamson was still processing the arrest, he called deputy Tuttle, gave him Fromhertz's phone number, and asked him to call Fromhertz about a possible drug transaction with people from Bloomington. Tuttle also knew Fromhertz from prior contacts.

¶ 10 Tuttle called Fromhertz and Fromhertz stated he arranged a cocaine delivery, which was in progress. He expected the drugs to be delivered in a vehicle containing a white woman, a white man, and a black man. He said his contact was a white man who went by the name "T.J." Tuttle testified Fromhertz seemed "pretty scared" because he did not have $400 to pay for the drugs and he expected the delivery to arrive in 15 minutes. Tuttle and another deputy left Bloomington toward LeRoy.

¶ 11 Fromhertz called Tuttle a second time and said he had just talked to T.J., who said he was exiting I-74 in LeRoy. Coincidentally, Tuttle was exiting I-74 in LeRoy and he observed three vehicles: his car, the other deputy's car, and a third car behind theirs. Tuttle and the other deputy exited toward Fromhertz's residence and pulled into a gas station to allow the third car to pass. Tuttle observed three people in the car: the driver was a white woman, the front-seat passenger was a black man, and he could not identify the race or gender of the backseat passenger. Tuttle and the other deputy followed the car.

¶ 12 Tuttle called Fromhertz and asked whether that was the vehicle he was expecting. Fromhertz told Tuttle if the car parked in the lot behind Fromhertz's apartment building, then it was the correct car. Tuttle followed the car and observed it park "directly" behind Fromhertz's apartment. Tuttle parked perpendicular to the vehicle and illuminated his lights.

¶ 13 Tuttle, the other deputy, and Williamson, who had been hiding in the bushes, approached the car. The white man in the backseat was named Thomas J. Tillman. Williamson spoke with the driver while Tuttle spoke with defendant, who was the front-seat passenger. Tuttle asked defendant what they were doing and defendant gestured toward T.J. and said they were visiting one of T.J.'s friends. Tuttle asked T.J. what his friend's name was, and T.J. said his friend's name was Brian.

¶ 14 At that point, the officers requested the three individuals to get out of the car. Tuttle conducted a pat-down search of defendant, looking for weapons and "possibly drugs." Tuttle did not find any weapons or drugs on defendant's person. A search of the vehicle was also conducted, but no contraband was found.

¶ 15 Tuttle called Fromhertz to get an identification. Looking from his apartment window, Fromhertz identified Tillman as T.J., his contact, but he did not recognize either defendant or the driver. He reported he knew T.J. was an intermediary between drug purchasers and a black, male drug dealer. Tuttle told Fromhertz he did not find any drugs on the suspects or in their car and asked him where the cocaine was ordinarily located. Fromhertz told Tuttle to check the suspects' mouths.

¶ 16 Tuttle approached T.J. and asked him to open his mouth and lift his tongue. Tuttle did not observe any drugs or anything suspicious about the way T.J. performed the test. Tuttle next shone the flashlight at defendant and asked him to open his mouth and lift his tongue.

Defendant kept his upper lip tucked under his upper teeth and Tuttle recognized defendant's behavior as suspicious of concealing contraband. Tuttle "pinched" defendant's upper lip with his thumb and forefinger and "could tell" there was an object there. He told defendant "to spit it out" and defendant said, "[O]kay, I'm going to give it to you." He spat out one plastic Baggie containing suspected cocaine. Tuttle observed defendant sucking in his cheeks, apparently to "work up enough saliva to swallow" the remaining contents. Tuttle attempted to remove the remaining contraband but defendant jerked away and a struggle ensued. Eventually, several more Baggies of suspected cocaine were removed from defendant's mouth. Tuttle estimated 15 minutes elapsed from his initial contact with the suspect vehicle in Fromhertz's parking lot to his discovery of contraband on defendant's person. Although he did not know it when he was searching defendant, sometime later, Tuttle learned defendant had been on mandatory supervised release (MSR), or what used to be known as parole, at the time of these events.

¶ 17 Following the evidence, the trial court heard the parties' arguments on defendant's motion "to quash arrest and suppress evidence." The trial court found the officers' stop was supported by an articulable suspicion the passengers in the car were involved in an ongoing crime based on Fromhertz's information. With respect to the search of defendant's person, the trial court concluded the fourth amendment (U.S. Const., amend. IV) does not prohibit a police officer from conducting a suspicionless search of a parolee. The trial court therefore denied defendant's motion "to quash arrest and suppress evidence."

¶ 18 C. Trial and Sentencing

¶ 19 On February 6 and March 2, 2009, defendant was tried in a two-day bench trial. The evidence consisted of testimony by Williamson, Tuttle, LeRoy police officer Nathan Wilkins, McLean County sheriff's deputy Joe Reidy, Detective Tim Tyler, forensic scientist Joni

Little, Fromhertz, and T.J. Defendant elected not to testify and did not present any evidence on his behalf. The trial court found defendant guilty of unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(d)(i) (West 2008)) and unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2008)). On April 17, 2009, the trial court sentenced defendant to 12 years' imprisonment and 3 years' MSR following his prison term. The trial court determined the conviction for possession was a lesser-included offense and did not warrant sentencing.

¶ 20 On April 21, 2009, defendant's attorney filed a motion to reconsider sentence, asserting the sentence was excessive. On August 7, 2009, the trial court denied defendant's motion to reconsider sentence.

¶ 21 D. Ineffective Assistance of Counsel

¶ 22 Throughout the proceedings defendant complained of ineffective assistance of counsel. In November 2008, he requested substitution of counsel, claiming a "conflict of interest" with appointed counsel, stating, "We don't agree on anything." In December 2008, defendant sent letters to the court requesting substitution of trial counsel. He also filed a *pro se* "motion of ineffective counsel's [*sic*]," again alleging a "conflict of interest." His foremost complaint was his public defender was not following his instructions to file a motion to quash and suppress. Defendant ultimately agreed to withdraw his motion because counsel stated he was prepared to file a motion to suppress. Following his conviction, defendant filed various *pro se* motions and letters to the trial court raising several contentions of error involving his representation by appointed counsel. The trial court did not address defendant's allegations of ineffective assistance of counsel.

¶ 23 E. Direct Appeal

¶ 24 On direct appeal, defendant argued, *inter alia*, the trial court erred when it (1) denied his motion to quash arrest and suppress evidence; and (2) failed to inquire into his posttrial *pro se* claims of ineffective assistance of counsel. This court affirmed, finding, *inter alia*, (1) the tip from Fromhertz and the investigatory steps taken by police were sufficient to justify the stop; (2) police obtained probable cause to arrest defendant and were justified in searching defendant's mouth incident to such arrest; (3) the trial court was not required to inquire into defendant's *pro se* posttrial allegations of ineffective assistance of counsel; and (4) defendant's allegations do not support an ineffective-assistance-of-counsel claim because matters of trial strategy are left to counsel. See *People v. Allen*, 409 Ill. App. 3d 1058, 950 N.E.2d 1164 (2011).

¶ 25 F. Postconviction Petition

¶ 26 On April 26, 2012, defendant filed a *pro se* postconviction petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2012)). He claims (1) his constitutional right to be free from unreasonable search and seizure was violated because (a) the information provided by Fromhertz was not credible and the initial stop was not supported by articulable suspicion, (b) the search of defendant's mouth was unreasonable in scope and the investigative detention unreasonable in duration, and (c) the police did not have authority from their supervisor to conduct a controlled buy; (2) the grand jury was misled because it was not aware of the illegal search; and (3) trial and appellate counsel were ineffective for failing to investigate the manipulation of the grand jury.

¶ 27 On July 18, 2012, the trial court summarily dismissed the petition in a written order, finding defendant's claims frivolous and patently without merit. On August 27, 2012, defendant appealed the court's decision, and OSAD was appointed to represent him.

¶ 28 II. ANALYSIS

¶ 29 OSAD moves to withdraw as counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), arguing no meritorious arguments can be raised on appeal. The record shows service on defendant. On our own motion, this court granted defendant leave to file additional points and authorities by May 12, 2014. He filed none. After reviewing the record consistent with our responsibilities under *Finley*, we agree with OSAD.

¶ 30 The Act (725 ILCS 5/122-1 to 122-7 (West 2012)) allows for postconviction relief through a three-stage procedure. *People v. Hodges*, 234 Ill. 2d 1, 10, 912 N.E.2d 1204, 1208 (2009). Here, defendant's petition was dismissed at the first stage of the postconviction proceeding. 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). A court may summarily dismiss a *pro se* postconviction petition "as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 11-12, 912 N.E.2d at 1209.

¶ 31 "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." *Id*. 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." (Internal quotation marks omitted.) *People v. Alcozer*, 241 Ill. 2d 248, 258-59, 948 N.E.2d 70, 77 (2011). An otherwise meritorious claim has no basis in law if *res judicata* or

forfeiture bar the claim. *People v. Blair*, 215 Ill. 2d 427, 445, 831 N.E.2d 604, 615-16 (2005). Our review of a first-stage dismissal is *de novo*. *People v. Ligon*, 239 Ill. 2d 94, 104, 940 N.E.2d 1067, 1074 (2010).

¶ 32 A. Unreasonable Search and Seizure

¶ 33 OSAD argues defendant's postconviction claims regarding the search and seizure were raised and adjudicated on direct appeal, and therefore defendant has no colorable argument to survive a first-stage dismissal. We agree.

¶ 34 In this case, defendant contends his constitutional right to be free from unreasonable search and seizure was violated because the information provided by Fromhertz was not reliable and his detention was not supported by a reasonable, articulable suspicion. However, this issue was previously raised and decided on direct appeal. See *Allen*, 409 Ill. App. 3d at 1069-73, 950 N.E.2d at 1176-79. The issue is barred from consideration in the postconviction context by *res judicata*. *Harris*, 206 Ill. 2d at 12, 794 N.E.2d at 323.

¶ 35 Defendant further alleges, even if the seizure was reasonable in its inception, the search of his mouth, which resulted in the discovery of contraband, exceeded the scope of any permissible investigation under *Terry*. He also asserts the investigatory detention was unreasonable in duration. These issues were previously raised and decided on direct appeal. See *Allen*, 409 Ill. App. 3d at 1073-76, 950 N.E.2d at 1180-81. Our review of these issues is also barred by *res judicata*. *Harris*, 206 Ill. 2d at 12, 794 N.E.2d at 323.

¶ 36 Finally, defendant argues the investigation was led by Fromhertz, an informant, and Williamson and Tuttle did not have authority (presumably from their supervisor) to conduct a controlled buy. This issue could have been presented on direct appeal but was not. Review of this issue is forfeited. *Id.* at 13, 794 N.E.2d at 323.

¶ 37 As a result, no meritorious argument can be made in this court defendant's fourth-amendment right against unreasonable search and seizure was violated.

¶ 38 In closing, we note this court has stated defendants should stop titling such motions as "motions to quash arrest" when no assertion is made the arrest is void, and simply title the motion as "motion to suppress evidence" to properly denominate the appropriate relief. *People v. Hansen*, 2012 IL App (4th) 110603, ¶¶ 62-63, 968 N.E.2d 164. The only relief a defendant is entitled to under section 114-12 of the Code of Criminal Procedure of 1963 (725 ILCS 5/114-12 (West 2008)) is the suppression of evidence where it is shown the evidence was the result of an improper stop.

¶ 39 B. Grand Jury

¶ 40 Defendant next contends his sixth and fourteenth amendment due-process rights (U.S. Const., amends. VI, XIV, § 1) were violated because the prosecutor procured the indictment by misleading the grand jury—*i.e.*, by withholding information about the unlawful search. This claim is barred by the doctrine of *res judicata* because it hinges on whether the search of defendant's mouth was unlawful. As discussed above, this issue was addressed on direct appeal.

¶ 41 Regardless of whether defendant's claim is *res judicata*, his allegation of grand jury manipulation is without merit. An indictment may be dismissed if the defendant establishes he suffered a prejudicial denial of due process. *People v. Holmes*, 397 Ill. App. 3d 737, 741, 922 N.E.2d 1179, 1184 (2010). The defendant must establish, however, "the denial of due process is 'unequivocally clear' and that the prejudice is 'actual and substantial.' " *Id.* (quoting *People v. Oliver*, 368 Ill. App. 3d 690, 695, 859 N.E.2d 38, 43 (2006)). "The due process rights of a defendant may be violated if the prosecutor deliberately or intentionally misleads the grand jury,

uses known perjured or false testimony, or presents other deceptive or inaccurate evidence." *People v. DiVincenzo*, 183 Ill. 2d 239, 257, 700 N.E.2d 981, 991 (1998).

¶ 42 In this case, Detective Gray was the only witness to testify at the grand jury proceedings and defendant notes he was not at the scene of the arrest. However, the fact testimony before a grand jury is hearsay does not invalidate an indictment. See *People v. Mattis*, 367 Ill. App. 3d 432, 436, 854 N.E.2d 1149, 1152-53 (2006). Rather, a defendant must establish the testimony was so deceptive or inaccurate that it affected the grand jury's deliberations. *DiVincenzo*, 183 Ill. 2d at 257, 700 N.E.2d at 991. Here, Gray did not tell the grand jury he was present at the scene or observed the events in question; rather, he testified he was familiar with and reviewed the materials related to an arrest by LeRoy police on October 17, 2008. Nothing in the record suggests his testimony was false. Any discrepancies in Gray's testimony to the grand jury related to relatively minor details and would not have altered the nature of the crimes with which defendant was charged. See *Mattis*, 367 Ill. App. 3d at 438, 854 N.E.2d at 1154 (false grand jury testimony did not warrant dismissing the indictment where a truthful answer would not have substantially influenced the grand jury's decision). Therefore, defendant's due-process rights were not violated.

¶ 43 C. Ineffective-Assistance-of-Counsel Claim

¶ 44 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." *Id*. 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. *Id*.

¶ 45 On direct appeal, defendant argued, and this court rejected, defendant's claim of ineffective assistance of trial counsel. See *Allen*, 409 Ill. App. 3d at 1077-78, 950 N.E.2d at 1183. Accordingly, this issue is barred by *res judicata*.

¶ 46 Finally, defendant alleges ineffective assistance of appellate counsel for not raising the grand-jury-manipulation issue in his direct appeal. However, appellate counsel is not required to raise every conceivable issue on appeal. *Harris*, 206 Ill. 2d at 34, 794 N.E.2d at 335. Counsel's decision as to what issues to raise on appeal will not be questioned unless the decision "[was] patently wrong." (Internal quotation marks omitted.) *Id*. As discussed above, defendant's claim regarding grand jury manipulation is without merit. "[E]ven if improper evidence had been presented to the grand jury, Illinois cases would traditionally uphold the propriety of the indictment as long as, as here, competent witnesses testified before the grand jury." *People v. Jackson*, 64 Ill. App. 3d 307, 312, 381 N.E.2d 316, 320 (1978). Therefore, defendant suffered no prejudice from counsel's failure to investigate or raise the alleged grand jury manipulation on appeal. *Harris*, 206 Ill. 2d at 34, 794 N.E.2d at 335. As a result, no meritorious argument can be made in this court defendant was provided ineffective assistance of counsel.

¶ 47 D. Fines and Fees

¶ 48 As the dissent notes, the majority decision says nothing about fines and fees. Neither defendant nor the State raised any issue about fines and fees. We decline to use judicial resources to address fines and fees in this case.

¶ 49 III. CONCLUSION

¶ 50 After reviewing the record consistent with our responsibilities under *Finley*, we agree with OSAD no meritorious issues can be raised on appeal. We grant OSAD's motion to withdraw as counsel for defendant and affirm the trial court's judgment.

¶ 51 Affirmed.

¶ 52 PRESIDING JUSTICE POPE, specially concurring.

¶ 53 I agree the trial court's judgment should be affirmed. However, the discussion of motions to quash is unnecessary to a resolution of the issues in this case. Thus, I disagree with the majority addressing motions to quash arrest and suppress evidence because no party has raised or briefed this issue. For the reasons I articulated in my special concurrence in *People v. Ramirez*, 2013 IL App (4th) 121153, 996 N.E.2d 1227, I similarly specially concur in this case.

¶ 54 JUSTICE APPLETON, concurring in part and dissenting in part.

¶ 55 I concur in part with the majority's decision, and I dissent in part. I agree we should grant OSAD's motion to withdraw, and I agree we should uphold the summary dismissal of the postconviction petition. Nevertheless, I take issue with an omission in the majority's decision: nothing is said about void fines. The circuit clerk imposed fines in this case, and because the circuit clerk rather than a judge imposed them, these fines are, as the cases say over and over again, "void from their inception." See, *e.g.*, *People v. Larue*, 2014 IL App (4th) 120595, ¶ 56; *People v. Montag*, 2014 IL App (4th) 120993, ¶ 37; *People v. Alghadi*, 2011 IL App (4th) 100012, ¶ 20.

¶ 56 Why does it matter that these fines are void? It matters because if the fines the circuit clerk imposed are void, these fines effectively do not exist: the sentence lacks them. Insomuch as the sentence lacks fines that statutory law requires, the sentence is more lenient than statutory law allows. The supreme court has held that a sentence which is more lenient (or, for that matter, harsher) than statutory law allows is an "illegal and void" sentence. *People v. White*, 2011 IL 109616, ¶ 20; see also *People v. Arna*, 168 Ill. 2d 107, 113 (1995); *People v. Montiel*, 365 Ill. App. 3d 601, 606 (2006) ("We hold the defendant's sentence to be void to the extent it does not include required fines and fees."). Although the majority does not regard it as a worthwhile use of judicial resources to address void fines, the supreme court has repeatedly exhorted us that we "have an independent duty to vacate void orders." *Delgado v. Board of Election Commissioners of the City of Chicago*, 224 Ill. 2d 481, 486 (2007); *People v. Thompson*, 209 Ill. 2d 19, 27 (2004); see also *Montiel*, 365 Ill. App. 3d at 606. Civil disobedience is not an option for us.

¶ 57 Rather than repeat myself, however, I merely will cite my partial dissent in *People v. Breeden*, 2014 IL App (4th) 121049 (Appleton, P.J., concurring in part and dissenting in part), which discusses, at considerable length, assessments that are essentially fines even though the legislature has called them "fees" or "costs."