2014 IL App (4th) 120919-U

NO. 4-12-0919

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

March 20, 2014
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Adams County
JERROLD D. JOHNSON,	)	No. 07CF86
Defendant-Appellant.	)	
	)	Honorable
	)	Alesia A. McMillen,
	)	Judge Presiding.

PRESIDING JUSTICE APPLETON delivered the judgment of the court.
Justices Harris and Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: In the second stage of the postconviction proceeding, defendant failed to make a substantial showing of a constitutional violation, and therefore, the dismissal of his postconviction petition is affirmed.

¶ 2 Defendant, Jerrold D. Johnson, appeals the dismissal of his postconviction petition in the second stage of the postconviction proceeding. See *People v. Lara*, 317 Ill. App. 3d 905, 907-08 (2000) (describing the three stages of a postconviction proceeding).

¶ 3 The office of the State Appellate Defender (OSAD) filed a brief on defendant's behalf. Dissatisfied with OSAD's brief, defendant filed a "Motion To Remove Counsel for Cause and Amend Appellate Brief, *Pro Se* Instanter." We declined to revoke OSAD's appointment, but we ruled that defendant's motion would be regarded as a *pro se* supplemental appellant's brief.

¶ 4 After reading the briefs of OSAD, defendant, and the State, and after reviewing the relevant parts of the record, we conclude, *de novo*, that the postconviction petition, liberally construed in the light of the record, fails to make a substantial showing of a constitutional violation. See *People v. Gacho*, 2012 IL App (1st) 091675, ¶ 16. Therefore, we affirm the trial court's judgment.

¶ 5 I. BACKGROUND

¶ 6 A. The Information

¶ 7 The State charged that on October 27, 2006, defendant committed armed robbery (720 ILCS 5/18-2(a)(1) (West 2006)) by robbing Erin Royce at knifepoint. (The trial court appointed Public Defender Robert Downey to represent defendant. Downey represented defendant at the five appearances before the court, in June 2007, allowed defendant's motion to proceed *pro se*. In February 2008, privately retained attorney Christian Baril entered his appearance for defendant, and the case proceeded to jury trial. After four witnesses testified, defendant moved to proceed *pro se*, which the court denied.)

¶ 8 B. The Quashing of Subpoenas in a Pretrial Hearing

¶ 9 A baseball cap fell off the robber's head at the scene of the robbery, and the Illinois State Police forensic laboratory found deoxyribonucleic acid (DNA) on the cap. The DNA on the cap appeared to match the DNA of defendant, which was catalogued in the Combined DNA Index System (CODIS). Even so, the forensic laboratory wanted a reference sample of DNA from defendant to confirm the match. To that end, the trial court ordered the collection of saliva from defendant.

¶ 10 Defendant, who had chosen to represent himself, filed a motion to stay that order. Before the trial court ruled on defendant's motion, a Quincy detective, Gabriel Vanderpol, was

dispatched to the Adams County jail to collect the sample. Using a buccal swab, Vanderpol collected a sample of defendant's saliva from inside his mouth. Defendant refused to cooperate with this procedure, and hence some physical coercion was necessary: he had to be handcuffed, and he had to be forced to sit down, although he did voluntarily open his mouth.

¶ 11 In the *pro se* motion that defendant filed with us, he alleges: "Vanderpol later admitted before the court that he had not followed all of the instructions provided with the biological evidence collection kit when collecting the sample of saliva from [defendant]." The *pro se* motion further alleges that because of the "forceful manner" in which the saliva sample was collected and because of "Vanderpol's admission of not following all instructions of the evidence collection kit," defendant filed a "Motion To Suppress Evidence Hearing."

¶ 12 At defendant's request, two scientists from the Illinois State Police forensic laboratory, Dana Pitchford and Aaron Small, were subpoenaed to testify in the upcoming pretrial hearing and to bring along a biological evidence collection kit such as that which Vanderpol had used. Six days after the issuance of these subpoenas, a different judge granted the State's motion to quash the subpoenas on the ground that "the witnesses subpoenaed by the defendant [could] offer no relevant testimony to the issue of the suppression of the evidence in question."

¶ 13 C. Evidence in the Jury Trial, Held in July 2008

¶ 14 On October 27, 2006, between approximately 1:20 and 1:30 a.m., Erin Royce was robbed at knifepoint after she closed the Looney Bin Tavern in Quincy, Illinois. She described the robber as a black male wearing a black baseball cap. The man held a knife to her throat and demanded her money. She gave him $13. Then she heard another woman shout to her, asking her if she needed help. Royce stumbled, and the robber took off running. As the robber ran away, Royce noticed he no longer was wearing the baseball cap. She saw the baseball cap on the

ground. When the police arrived, she pointed out the baseball cap to them and told them it was the cap the robber had been wearing. Royce was unable to identify the robber in a photographic array.

¶ 15 Amanda Humke, a forensic scientist with the Illinois State Police, testified she swabbed the hatband inside the baseball cap and obtained a DNA profile. She compared the profile with a DNA database. Defendant's profile preliminarily matched the DNA from the baseball cap. Humke requested the collection of another sample from defendant to confirm the match.

¶ 16 Humke also "taped" the inside of the baseball cap to collect and preserve any hair or fibers that might have been present. She testified, however, that she was neither a microscopist nor a hair expert and that she could not testify whether any hair was on the cap. She did not notice any hair. She testified that, even if she had found hair on the cap, she would not have analyzed the hair for DNA, considering that she already had obtained DNA from the hatband.

¶ 17 Dana Pitchford, a forensic scientist with the Illinois State Police, testified she was asked to compare a known standard collected from defendant to the DNA profile collected by Humke from the swabbing of the baseball cap. Pitchford found that the profiles matched and that this profile would have occurred in one out of three quadrillion African-American males. Pitchford also testified that the profile taken from the baseball cap originated from a single source (*i.e.*, the profile did not contain DNA from two different people).

¶ 18 Henry T. Conforti testified he was the manager of a computer company that provided electronic services and support technology for monitoring the comings and goings of individuals. He explained that the company installed a field-monitoring device in the person's

home and that the person also wore an ankle bracelet. If the person moved outside a 100-foot range of the field-monitoring device, the host computer was notified through the telephone line. Also, the field-monitoring device sent signals to the host computer indicating whether the device was working properly, and it called the host computer randomly four times a day. The system prompted live operators to make outbound calls to the locations where the field-monitoring devices were installed. For instance, if the field-monitoring device was not working properly or if the person left the 100-foot range without permission, the company was alerted, and an operator called the residence.

¶ 19 The company monitored defendant in the summer and fall of 2006. Conforti testified that on October 26, 2006 (the day before the offense), at 12:53 a.m., all communications between the unit in defendant's residence and the host computer stopped. This caused the field-monitoring device to send a "missed call" signal, which meant the device no longer was working properly. An operator immediately called defendant's residence and confirmed he was home.

¶ 20 That same day, at 11:26 a.m., defendant called with a question about the equipment. Conforti testified the "box" was not working properly. The operator asked defendant to play around with the device to see if he could get it working again. At 12:23 p.m., an operator called defendant to try to fix the equipment malfunction. At 8:22 p.m. on October 26, 2006, defendant called headquarters to report that he had returned home.

¶ 21 On October 27, 2006, at 12:50 a.m., headquarters received a "still missed call" message from the field-monitoring device, meaning that the unit still was not working properly. A live company operator called Johnson's residence at 12:57 a.m. on October 27, 2006, and no one answered the telephone call. The live operator called again at 1:27 a.m., and no one answered the telephone call. (Royce was robbed between 1:20 and 1:30 a.m. on October 27,

2006.) At 1:37 a.m., defendant called the company to confirm his working hours for the next day.

¶ 22 Defendant testified that in October 2006, he lived about 3 1/2 blocks from the Looney Bin Tavern and that he often rode his bicycle past the tavern as he was on his way to work. He recognized the black baseball cap as the one his nephew had given him. Defendant lost the cap sometime before October 15, 2006, when it blew off his head as he was bicycling to work. His ankle monitoring system often malfunctioned, and he admitted he knew it was malfunctioning on October 26, 2006. Nevertheless, he had worked with the company to correct the problem, and consequently, he had been under the impression that the problem was corrected. He did not know why he failed to answer the telephone calls during the early morning of October 27, 2006, but he had missed other calls because he was outside or in the shower. He denied he was the person who attacked Royce.

¶ 23 At the conclusion of defendant's testimony, the trial court admitted certified copies of his prior convictions. People's exhibit No. 6 was his armed-violence conviction in Sangamon County case No. 97-CF-109. People's exhibit No. 7 was his burglary conviction in Sangamon County case No. 02-CF-85. The court then instructed the jury to consider these previous convictions only for purposes of his believability, not as evidence that he was guilty of the charge in the present case. The court again gave the same instruction to the jury at the conclusion of the evidence, when reading the jury instructions.

¶ 24 The jury found defendant guilty of armed robbery.

¶ 25 On September 4, 2008, the State presented the trial court with a statement of defendant's prior convictions in order to qualify him as a habitual criminal. See 720 ILCS 5/33B-2(a) (West 2006) (providing that after a plea, verdict, or finding of guilt, but before

sentencing, the prosecutor can file a statement concerning a defendant's prior convictions); 720 ILCS 5/33B-1 (West 2006) (generally providing that a person with three Class X felonies shall be adjudged a habitual criminal and, except where the death penalty is imposed, shall be sentenced to life imprisonment). The statement indicated defendant had the following previous Class X convictions: (1) aggravated criminal sexual assault and home invasion in Sangamon County case No. 85-CF-681 and (2) armed violence in Sangamon County case No. 97-CF-109.

¶ 26 The trial court found defendant to be a habitual criminal and sentenced him to natural-life imprisonment.

¶ 27 D. The Direct Appeal

¶ 28 On direct appeal, defendant made three arguments: (1) in its admonitions, the trial court failed to inform him of the maximum penalty of life imprisonment before accepting his waiver of counsel; (2) the court abused its discretion by allowing the State to impeach defendant with his previous convictions of armed violence and burglary; and (3) the court failed to perform a preliminary inquiry into defendant's posttrial claims of ineffective assistance of privately retained counsel. *People v. Johnson*, No. 4-08-0807, slip order at 1 (April 29, 2010) (unpublished order under Supreme Court Rule 23). We disagreed with all three arguments, and we affirmed the trial court's judgment. *Id.*

¶ 29 E. The Postconviction Proceeding

¶ 30 In his postconviction petition and supplements thereto, defendant made 17 claims.

¶ 31 First, in reliance on Downey's erroneous advice that the maximum penalty he faced was 60 years' imprisonment, he rejected the State's plea offer of 30 years' imprisonment, not knowing that, as a habitual criminal, he actually faced mandatory life imprisonment.

¶ 32 Second, defense counsel rendered ineffective assistance by failing to hire a speech pathologist to opine that defendant had no lisp. (Royce testified that the robber spoke with a lisp, and Vanderpol testified that defendant likewise spoke with a lisp.)

¶ 33 Third, trial counsel Baril rendered ineffective assistance by failing to object to records generated by the malfunctioning ankle monitoring system.

¶ 34 Fourth, trial counsel Baril rendered ineffective assistance by failing to call Antoine Jackson, who would have testified that defendant had borrowed a cap from him after losing his own cap, and Leslie Abbot, defendant's former landlord, who would have explained how it was possible for someone in defendant's rented premises not to hear the telephone ringing.

¶ 35 Fifth, Baril rendered ineffective assistance by failing to obtain a subpoena *duces tecum* for defendant's telephone to show how easy it was for someone to unknowingly push a button and thereby prevent the telephone from ringing.

¶ 36 Sixth, Baril rendered ineffective assistance by failing to present evidence that defendant suffers from a 90% hearing loss in one ear as well as a neurological condition that causes him to experience seizures, making him oblivious to a ringing telephone.

¶ 37 Seventh, Baril rendered ineffective assistance by initiating and participating in the "mere fact impeachment" of defendant through evidence that he had worn an ankle monitor.

¶ 38 Eighth, Baril rendered ineffective assistance by requesting the trial court to instruct the jury that defendant had two previous felony convictions.

¶ 39 Ninth, appellate counsel on direct appeal rendered ineffective assistance by failing to raise the issues that defendant now raises in his postconviction petition.

¶ 40 Tenth, the trial court erred by denying as untimely defendant's motion to represent himself in the trial.

¶ 41 Eleventh, defendant was denied his right to an independent analysis of the DNA evidence.

¶ 42 Twelfth, the State suppressed evidence favorable to the defense by providing the results for only one swab of the cap, although the cap was swabbed twice.

¶ 43 Thirteenth, the State withheld information and evidence from the defense, namely, contact information for Conforti, the audio recording and written transcripts of a listening device worn in defendant's presence in the jail, and the second photographic array shown to Royce.

¶ 44 Fourteenth, the trial court committed plain error by admitting in evidence the computer-generated records from the ankle monitoring system without first requiring the State to lay a foundation pursuant to section 115-5 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-5 (West 2008)).

¶ 45 Fifteenth, the trial court violated due process by admitting in evidence a computer-generated business record that (a) lacked a proper foundation, (b) was untrustworthy, (c) was nonprobative, (d) was irrelevant, and (e) had the effect of improperly impeaching defendant.

¶ 46 Sixteenth, the prosecutor denied due process to defendant by presenting the ankle monitoring records, knowing that they were untrustworthy and that they lacked a proper foundation.

¶ 47 Seventeenth, the State failed to correct the testimony of Humke when she testified, falsely, that she had found no hair on the baseball cap, whereas her report indicated she did find hair.

¶ 48 The State moved to dismiss the postconviction petition on several grounds, including *res judicata* and procedural forfeiture.

¶ 49 On September 7, 2012, the trial court granted the motion for dismissal.

¶ 50 This appeal followed.

¶ 51 II. ANALYSIS

¶ 52 A. OSAD's Argument

¶ 53 According to OSAD, defendant has made a substantial showing of ineffective assistance in that, when rejecting the State's plea offer of 30 years' imprisonment, he relied on Downey's incorrect advice that 60 years' imprisonment was the maximum prison sentence he could receive. In reality, defendant faced mandatory life imprisonment as a habitual criminal. See 720 ILCS 5/33B-1(a), (e) (West 2006).

¶ 54 OSAD argues that Downey's performance in this case is indistinguishable from that of the defense counsel in *People v. Brown*, 309 Ill. App. 3d 599 (1999). In *Brown*, the State charged the defendant with aggravated battery with a firearm (720 ILCS 5/12-4.2(a) (West 1996)), among other offenses. *Id*. at 601. The State made a plea offer of 18 years' imprisonment and a subsequent plea offer of 15 years' imprisonment. *Id.* at 603. Defense counsel never informed the defendant that, if he were convicted, he would face mandatory life imprisonment as a habitual criminal. *Id.* at 603. The defendant asserted that, had he known he faced mandatory life imprisonment, he would have accepted the State's final plea offer of 15 years' imprisonment. *Id.*

¶ 55 The appellate court found defense counsel's performance to be substandard, considering that it was impossible for the defendant to intelligently weigh the State's plea offers

while being unaware that he would spend the rest of his life in prison if he were convicted of count I of the indictment, aggravated battery with a firearm. *Id.* at 605.

¶ 56 Deficient performance, however, was only one element of a claim of ineffective assistance; the other element was prejudice. *Id.* at 604. When evaluating prejudice, the appellate court acknowledged that, even if the defendant had accepted either of the State's plea offers, the trial court could not have approved the plea offer, because any sentence other than life imprisonment would have been a statutorily unauthorized sentence. *Id.* at 606. Even so, the appellate court found counsel had provided ineffective assistance. *Id.* at 607. The appellate court reasoned that, if defense counsel had known that life imprisonment would be the only authorized sentence for the charge of aggravated battery with a firearm, defense counsel could have negotiated for a dismissal or reduction of that charge. The appellate court said:

> "The question of whether a defendant has suffered prejudice should not turn on whether the State has unwittingly failed to propose an authorized sentence during tainted plea negotiations. It would be absurd to conclude that a defendant's right to the effective assistance of counsel should depend upon such happenstance.
>
> Instead, where neither party is aware that the defendant is subject to a severe, mandatory sentence, defense counsel's ignorance is sufficient to undermine confidence in the outcome of the negotiations. Had he been aware, defense counsel could have negotiated for dismissal or reduction of the aggravated battery with a firearm charge. There is no telling whether the State would have

> ever agreed to such a proposal. But, of course, the State's response to plea overtures is always, to some degree, conjectural." *Id.* at 606.

¶ 57 Under more recent case law, however, the speculation that defense counsel might have tried to bargain for a dismissal or reduction of a charge is insufficient to establish prejudice. The Supreme Court has held:

> "To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Missouri v. Frye*, _____ U.S. _____, _____, 132 S.Ct. 1399, 1409 (2012).

Thus, under *Frye*, prejudice requires the evaluation of a plea offer that the prosecutor actually made, not (as in *Brown*) the evaluation of a plea offer that defense counsel could have made but

did not make. Reasonable probability is more than speculation. *People v. Pecoraro*, 175 Ill. 2d 294, 315 (1997).

¶ 58 In this case, in which we take the factual allegations of the postconviction petition to be true (see *People v. Hall*, 217 Ill. 2d 324, 334 (2005)), the State made a plea offer of 30 years' imprisonment. According to *Frye*, a defendant must "demonstrate a reasonable probability the plea would have been entered without *** the trial court['s] refusing to accept it." *Frye*, _____ U.S. at _____, 132 S.Ct. at 1409. Because "[a] defendant has no entitlement to the luck of a lawless decisionmaker," we assume the court would have acted in accordance with the law. *Strickland v. Washington*, 466 U.S. 668, 695 (1984). Statutory law would have required the court to reject the plea offer of 30 years' imprisonment. See 720 ILCS 5/33B-1(a), (e) (West 2006). Therefore, defendant has failed to demonstrate prejudice. See *Frye*, _____ U.S. at _____, 132 S.Ct. at 1409.

¶ 59 B. Defendant's *Pro Se* Arguments

¶ 60 1. *Admitting Computer-Generated Evidence Without the Required Foundation*

¶ 61 Defendant contends that, in the absence of a foundation satisfying section 115-5 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-5 (West 2008)), it was "plain error" for the trial court to admit in evidence the computer-generated records corresponding to his ankle monitor.

¶ 62 It is unclear how the telephone calls of live operators are computer-generated records. In any event, defendant cites no authority holding that an insufficient foundation violates the federal constitution or Illinois constitution. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) ("Argument, which shall contain the contentions of the appellant and the reasons therefore, with citation of the authorities *** relief on."). In the second stage of the postconviction

proceeding, the question is whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. *People v. McGhee*, 2012 IL App (1st) 093404, ¶ 9. Statutes do not confer constitutional rights. *People v. Mitchell*, 189 Ill. 2d 312, 329 (2000).

¶ 63 2. *Quashing the Subpoenas Requiring Expert Witnesses To Testify in a Pretrial Hearing*

¶ 64 Defendant argues the trial court "committed plain and reversible error" by quashing the subpoenas requiring two forensic scientists from the Illinois State Police, Dana Pitchford and Aaron Small, to testify in a pretrial hearing on defendant's motion to suppress evidence. Defendant did not make this claim in his postconviction petition. Therefore, the claim is forfeited. See 725 ILCS 5/122-3 (West 2012) ("Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived.").

¶ *65* 3. *Impeachment With Evidence of Other Crimes*

¶ 66 In violation of the trial court's order forbidding any specific reference to CODIS, a police officer, Leo Mueller, mentioned "CODIS" in his testimony. Because CODIS was a database of DNA collected from convicted felons, defendant contends he thereby was "improperly impeached."

¶ 67 Defendant did not make this claim in his postconviction petition. Therefore, the claim is forfeited. See 725 ILCS 5/122-3 (West 2012). Even if we could set aside the obstacle of procedural forfeiture, defendant cites no case holding that improper impeachment is itself a constitutional violation.

¶ 68 4. *Invalid Waiver of Counsel*

¶ 69 Defendant argues that because the trial court failed to admonish him that he faced life imprisonment if he were convicted of the charge of armed robbery, his waiver of counsel was not knowing and intelligent. This claim is hard to reconcile with the claim that the

trial court erred by refusing to allow defendant to represent himself in the trial. In any event, we considered and rejected this claim on direct appeal. *People v. Johnson*, No. 4-08-0807, slip order at 9-23 (April 29, 2010) (unpublished order under Supreme Court Rule 23). We held that the trial court substantially complied with Illinois Supreme Court Rule 401(a) (eff. July 1, 1984), defendant knowingly and voluntarily waived his right to counsel, and his rights were not prejudiced. *Johnson*, No. 4-08-0807, slip order at 17. Therefore, *res judicata* bars this claim. See *Thompkins*, 161 Ill. 2d at 157-58.

¶ 70 III. CONCLUSION

¶ 71 For the foregoing reasons, we affirm the trial court's judgment. We award the State $50 in costs against defendant.

¶ 72 Affirmed.