2014 IL App (4th) 130212-U

NO. 4-13-0212

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
June 17, 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
RYAN YOSELOWITZ,	)	No. 09CF416
Defendant-Appellant.	)	
	)	Honorable
	)	Robert L. Freitag,
	)	Judge Presiding.

PRESIDING JUSTICE APPLETON delivered the judgment of the court.
Justices Knecht and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: Where no meritorious issues can be raised on appeal, the appellate court granted counsel's motion to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987).

¶ 2 In October 2009, as part of an open plea agreement, defendant, Ryan Yoselowitz, pleaded guilty to unlawful possession of cannabis with intent to deliver (720 ILCS 550/5(g) (West 2008)), a Class X felony, and the trial court sentenced him to 12 years in prison. Defendant appealed, arguing only that the sentencing provision of the Cannabis Control Act (720 ILCS 550/5(g) (West 2008)) was unconstitutional. This court affirmed defendant's conviction. *People v. Yoselowitz*, 2011 IL App (4th) 100764, ¶ 1. Defendant filed a postconviction petition, raising claims of ineffective assistance of trial and appellate counsel. The circuit court dismissed defendant's petition at the first stage of postconviction proceedings and defendant appealed. The office of the State Appellate Defender (OSAD) was appointed to represent defendant and now

moves for permission to withdraw from representing him, because, for the reasons OSAD discusses in its motion, it regards the appeal as frivolous. We notified defendant of his right to respond, by a certain date, with additional points and authorities, but he has not done so. After reviewing the record, we agree with OSAD that no reasonable argument could be made in support of this appeal. Therefore, we grant OSAD's motion to withdraw, and we affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 In May 2009, defendant was stopped for speeding while traveling on Interstate 55. When the trooper approached defendant's car, he noticed a strong odor of cannabis. Defendant provided his identification, but when the trooper asked defendant about the odor, defendant fled in his vehicle. After a high-speed chase, defendant was again stopped and arrested. A search of his vehicle revealed approximately 23 pounds of cannabis packaged for sale in the trunk. A search warrant of defendant's apartment in Chicago was executed, where officers discovered 13 pounds of cannabis packaged for sale, in addition to packaging materials, scales, and a money counter.

¶ 5 Defendant pleaded guilty to the unlawful-possession-of-cannabis-with-intent-to-deliver charge in exchange for the State's agreement not to file additional charges stemming from the ongoing drug investigation involving defendant. The parties did not agree to any terms related to sentencing.

¶ 6 Prior to sentencing, defendant filed a motion to declare unconstitutional the sentencing provision of section 5(g) of the Cannabis Control Act (720 ILCS 550/5(g) (West 2008)), which classifies the offense of possessing more than 5,000 grams of cannabis as a Class X felony. In particular, defendant argued such a classification is too harsh given the current

arguments surrounding the potential legalization of cannabis. The trial court denied defendant's motion and later sentenced him to 12 years in prison. Defendant appealed, raising the constitutional issue again, asserting both a proportionate-penalties and an equal-protection claim. However, in September 2011, this court affirmed defendant's conviction. *Yoselowitz*, 2011 IL App (4th) 100764, ¶ 1.

¶ 7 On July 20, 2012, defendant filed a *pro se* postconviction petition, alleging (1) trial counsel was ineffective for failing to challenge the officers' execution of a canine search of the vehicle, (2) trial counsel was ineffective for failing to challenge the officers' execution of a search of the vehicle without first obtaining a warrant, and (3) appellate counsel was ineffective for failing to request that this court address the "second prong of the test" regarding the constitutionality of section 5(g) of the Cannabis Control Act (720 ILCS 550/5(g) (West 2008)).

¶ 8 On October 17, 2012, the circuit court entered an order finding defendant's petition was frivolous and patently without merit. The court found defendant's guilty plea "waive[d] all non-jurisdictional errors or irregularities, including constitutional errors." Noting defendant had not challenged the voluntariness of his guilty plea, the court held defendant was precluded from raising the fourth-amendment issues pertaining to the search of defendant's vehicle. The court further noted, even if this court, in fact, did not address the "second prong" of the test, it could not be considered ineffective assistance since defendant admitted appellate counsel apparently raised the argument in his brief on direct appeal. The court noted:

> "[E]ven if, somehow, the failure of the appellate court to specifically address in its opinion the 'second prong' argument can be attributed to defendant's appellate counsel, the failure does not establish that the outcome of the appeal would have been any

different because the statutes [involved] do not meet the identical elements test."

The court dismissed defendant's petition. This appeal followed.

¶ 9 II. ANALYSIS

¶ 10 In OSAD's view, the allegations in defendant's postconviction petition are problematic for three reasons. First, the allegation regarding trial counsel's failure to challenge the search and seizure of defendant's vehicle has no legal merit because defendant was legally stopped for speeding, the officer smelled cannabis emanating from the vehicle, and defendant fled the scene. Once defendant was again legally detained, a canine officer conducted a walk-around sniff of the outside of the vehicle and alerted to the presence of drugs. The record does not indicate the officers lacked probable cause or that defendant was unreasonably detained. See *Illinois v. Caballes*, 543 U.S. 405, 407-08 (2005). A search of the interior of defendant's vehicle resulted in the recovery of more than 20 pounds of cannabis.

¶ 11 Based on the circumstances of the traffic stop and defendant's subsequent arrest, we find defendant cannot reasonably assert a violation of his fourth-amendment rights. Consequently, we find no arguable legal basis for defendant's claim that counsel's performance fell below an objective standard of reasonableness or that he was prejudiced when he failed to challenge the search and seizure of his vehicle. See *People v. Hodges*, 234 Ill. 2d 1, 17 (2009).

¶ 12 Second, defendant's claim that counsel should have challenged the officer's use of a canine search is likewise without merit. When defendant was detained after fleeing, the canine unit was already present, and therefore, defendant cannot argue the stop was unreasonably prolonged for the purpose of conducting a canine sniff. Likewise, the use of a drug-detection dog during a lawful traffic stop does not implicate legitimate privacy interests. *Caballes*, 543

U.S. at 409. Because no colorable argument can be made challenging the use of the canine, defendant cannot arguably demonstrate a claim of ineffective assistance of counsel related to this claim.

¶ 13 Third, no colorable argument can be made that appellate counsel was ineffective for failing to request that this court address the second prong of the proportionate-penalties test. On direct appeal, this court addressed the first prong in response to appellate counsel's argument that the punishment for the offense of possessing over 5,000 grams of cannabis with intent to deliver was so disproportionate to the offense itself that it shocked the moral sense of the community. *Yoselowitz*, 2011 IL App (4th) 100764, ¶ 1. Defendant insists his appellate counsel was ineffective for failing to request this court address the second prong as well "when in fact appellant [had] argued both prongs of the test."

¶ 14 The "second prong" to which defendant refers provides that in order to be successful on a proportionate-penalties claim, a defendant must show the penalty imposed differs from one imposed for an offense containing identical elements. See *People v. Brown*, 375 Ill. App. 3d 1116, 1118 (2007). For defendant to be successful at this stage of the postconviction proceedings on his ineffective-assistance claim, he must be able to demonstrate there exists a reasonable probability that he suffered prejudice when counsel failed to request that we address the second prong. In other words, defendant must be able to demonstrate a reasonable probability that the result of the proceedings would have been different. See *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Defendant cannot demonstrate prejudice.

¶ 15 Arguably, a comparable offense exists under the Narcotics Profit Forfeiture Act (725 ILCS 175/1 to 9 (West 2008)), wherein a person found guilty is sentenced as a Class 1 felony, as opposed to sentenced as a Class X felony under the Cannabis Control Act. However,

the elements of the two offenses are not the same, and are therefore not subject to analysis under the identical-elements test of a proportionate-penalties claim.

> "A person commits narcotics racketeering when he:
>
> (a) Receives income knowing such income to be derived, directly or indirectly, from a pattern of narcotics activity in which he participated, or for which he is accountable under Section 5-2 of the Criminal Code of 1961 [720 ILCS 5/5-2 (West 2008)]; or
>
> (b) Receives income, knowing such income to be derived, directly or indirectly, from a pattern of narcotics activity in which he participated, or for which he is accountable under Section 5-2 of the Criminal Code of 1961 [720 ILCS 5/5-2 (West 2008)], and he uses or invests, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise doing business in the State of Illinois; or
>
> (c) Knowingly, through a pattern of narcotics activity in which he participated, or for which he is accountable under Section 5-2 of the Criminal Code of 1961 [720 ILCS 5/5-2 (West

2008)], acquires or maintains, directly or indirectly, any interest in or contract of any enterprise which is engaged in, or the activities of which affect, business in the State of Illinois; or

(d) Being a person employed by or associated with any enterprise doing business in the State of Illinois, he knowingly conducts or participates, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of narcotics activity in which he participated, or for which he is accountable under Section 5-2 of the Criminal Code of 1961 [720 ILCS 5/5-2 (West 2008)]." 725 ILCS 175/4 (West 2008).

¶ 16 Whereas, the elements of unlawful possession of cannabis with intent to deliver are as follows:

"It is unlawful for any person knowingly to manufacture, deliver, or possess with intent to deliver, or manufacture, cannabis. Any person who violates this section with respect to:

* * *

(g) more than 5,000 grams of any substance containing cannabis is guilty of a Class X felony for which a fine not to exceed $200,000 may be imposed." 720 ILCS 550/5 (West 2008).

¶ 17 The elements of these distinct offenses are not the same. For instance, the former section does not take into account the quantity of drugs involved. It is apparent the legislature chose to punish more harshly those individuals involved with delivery of a large quantity of drugs versus those receiving income from multiple transactions involving a possibly smaller quantity of drugs. As such, these two offenses cannot be analyzed under the identical-elements test. Accordingly, defendant suffered no prejudice by counsel's failure to request that this court address the identical-elements test.

¶ 18 In short, we agree with OSAD that, for all three of these reasons, the summary dismissal of the postconviction petition was justified. It would be impossible to make any reasonable argument to the contrary.

¶ 19 III. CONCLUSION

¶ 20 For the reasons stated, we grant OSAD's motion to withdraw as counsel on appeal and affirm the trial court's judgment.

¶ 21 Affirmed.