2016 IL App (4th) 150204-U

NO. 4-15-0204

FILED
November 16, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
KWENTON PALMER-SMITH,	)	No. 12CF747
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Harris and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, finding the trial court did not err in summarily dismissing defendant's *pro se* postconviction petition.

¶ 2 In April 2013, defendant, Kwenton Palmer-Smith, entered a negotiated guilty plea to unlawful possession with the intent to deliver more than 900 grams of a substance containing cocaine (720 ILCS 570/401(a)(2)(D) (West 2012)), a Class X felony punishable by 15 to 60 years in prison. In exchange, the State agreed to dismiss two counts and recommended a sentencing cap of 20 years in prison. In May 2013, the trial court sentenced defendant to 20 years' imprisonment.

¶ 3 In February 2015, 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 2014)). In it, he argued he was denied his right to effective assistance of counsel, as his trial counsel failed to

investigate applicable case law regarding his motions to suppress evidence and, but for his counsel's failures, he would not have pleaded guilty. He also alleged ineffective assistance of his appellate counsel. That same month, the trial court summarily dismissed defendant's petition. On appeal, defendant argues the trial court erred in summarily dismissing his postconviction petition. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In May 2012, the State charged defendant by information with unlawful possession with the intent to deliver a controlled substance containing 900 grams or more of cocaine (count I) (720 ILCS 570/401(a)(2)(D) (West 2012)), a Class X felony with a sentencing range of 15 to 60 years in prison; unlawful possession with the intent to distribute more than 2,000 but less than 5,000 grams of cannabis (count II) (720 ILCS 550/5(f) (West 2012)), a Class 1 felony with a sentencing range of 4 to 15 years in prison; and aggravated unlawful possession of a firearm by a felon (count III) (720 ILCS 5/24-1.1(a) (West 2012)), a Class 2 felony with a mandatory sentence of 3 to 14 years in prison.

¶ 6 In July 2012, defense counsel filed motions to suppress evidence recovered as a result of May 2012 search warrants issued for two private residences, alleging the complaint and affidavits used to obtain the warrants did not adequately establish a fair probability evidence of a crime would be found in either of the two residences. One of the residences, 3104 Sylvan Drive, in Champaign, Illinois, was defendant's parents' residence. The other residence, 808 Sherwood Terrace, Champaign, Illinois, was defendant's residence and the site where officers discovered over 3,000 grams of cocaine, over 5,000 grams of cannabis, over $73,000 in cash, drug packaging materials, and a loaded .45-caliber handgun. In July and August 2012, counsel filed motions to suppress, alleging warrantless open-air sniffs outside the two residences violated defendant's

reasonable expectation of privacy. Defendant asked the drug-sniffing dog's alert to the presence of drugs be "declared illegally obtained and not used to support probable cause to support the issuance of a [search] warrant [for either residence]."

¶ 7 According to the May 2012 complaint and affidavit for search warrants, a confidential informant told the complainant-affiant, Officer Jeremiah Christian of the Champaign police department, in March 2012, she had purchased cocaine from defendant "on at least thirty occasions." The locations of the purchases had always varied but, according to Christian, the informant stated defendant was the "sole occupant of a Buick passenger car that is gold in color." The sworn complaint stated, in March and May 2012, the confidential informant completed four controlled purchases of cocaine from defendant.

¶ 8 During surveillance by the Champaign police department, defendant was observed "frequenting and utilizing" the Sherwood Terrace residence. According to the complaint, "prior to the [informant] making the arrangements for the last three of the controlled purchases ***, [defendant] was observed departing from [808 Sherwood Terrace]."

¶ 9 The sworn complaint states Christian learned of defendant's use of a Buick as his primary vehicle through his discussions with the informant and from the surveillance of defendant. In April 2012, Christian applied for and obtained a search warrant authorizing the installation of a global positioning system (GPS) tracker on defendant's Buick. Data gleaned from the GPS showed defendant consistently used a residence at 808 Sherwood Terrace in Champaign, typically arriving in the morning and staying for hours afterward. GPS data concerning the Sherwood Terrace residence was confirmed by officers' visual surveillance of defendant. According to the complaint, based on Christian's training and experience and "on the information obtained from [the informant], along with monitoring of said GPS tracking device and visual

surveillance of [defendant] conducted by officers, it [was] believed [defendant] continue[d] to possess crack cocaine inside of [the Sherwood Terrace residence]."

¶ 10 The complaint states, based on these facts, Christian requested a canine officer to conduct an open-air sweep of the front door of the Sherwood Terrace residence. In May 2012, the canine officer conducted an open-air sniff surrounding the front doors of the Sylvan Drive and Sherwood Terrace residences using a drug-sniffing dog. The canine officer reported the dog alerted to the odor of cannabis or narcotics at the front doorway at each residence. No search warrant was obtained for the open-air sniff.

¶ 11 In October 2012, the trial court held a hearing on defendant's July and August 2012 motions to suppress evidence discovered as a result of warrantless open-air sniffs in violation of defendant's reasonable expectation of privacy. The canine officer testified, *inter alia*, he was asked to conduct an open-air sniff of the Sherwood Terrace and Sylvan Drive residences. He testified both houses had an unobstructed pathway to the front door and he did not notice any "no trespassing" signs. On cross-examination and redirect, the officer clarified the Sylvan Drive residence had a fence, but he did not have to open it and the fence did not block his path to the front door. After being shown a purported photograph of the Sherwood Terrace residence with a "no trespassing" sign in the window, the officer reiterated he had not seen such a sign on the night he conducted the open-air sniff. He testified the drug-sniffing dog alerted to the presence of narcotics or cannabis at both residences. The court gave both parties an opportunity to provide case law and stated it would rule on the motion in November 2012. The matter was continued from time to time without a ruling on the motion to suppress.

¶ 12 In February 2013, defendant filed a motion to reopen the hearing on the motions to suppress, stating the United States Supreme Court was due to file an opinion in *Florida v.*

Jardines, ___ U.S. ___, 133 S. Ct. 1409 (2013), a case considering whether an open-air sniff at the front of a residence is a search requiring probable cause. At the hearing on defendant's motion to reopen, defendant asked the court to reopen so he could challenge the open-air sniff by obtaining certification and testing information on the canine involved and to consider whether a sufficient basis was shown to find probable cause for the search warrants for the residences. Defendant's counsel relied on *Florida v. Harris*, ___ U.S. ___, 133 S. Ct. 1050 (2013), a United States Supreme Court decision issued earlier that month, regarding certification of drug-sniffing dogs. The trial court denied the motion to reopen, stating:

> "It is the court's opinion that [the] last two paragraphs [of the complaint and affidavit for search warrant] concerning the dog sweep didn't add that much to the search warrant. That the search warrant, based upon the affidavit and the paragraphs preceding that, I believe, provided enough probable cause to effectuate the issuance of the search warrant.
>
> The court's ruling was, and is, the basic issue was that dog walked up with the handler to the doorway, and alerted and left. There was a no-trespassing sign. Was there a fence? Was there a gate? Was it locked? Was there some form of indication to stay off the property? There may or may not have been a handwritten sign that indicated no trespassing, the officer indicated he didn't see that. So that the court's decision on the initial motion to suppress is that motion is denied."

¶ 13 On April 5, 2013, defendant filed an amended motion to suppress evidence, ask-

ing that his motion to quash the search warrant for the Sherwood Terrace residence and suppress evidence discovered therefrom be granted. Defendant alleged the complaint and affidavit for the search warrant contained insufficient information to establish probable cause and was based on uncorroborated hearsay. Defendant also alleged the open-air sniff outside his residence was an illegal search under the Supreme Court's recent opinion in *Jardines* and, therefore, could not be used to support a search warrant for Sherwood Terrace. The motion was not called for a hearing, apparently because defendant decided to enter a negotiated plea that same day.

¶ 14 On April 5, 2013, defendant indicated he agreed to plead guilty to count I in exchange for the State agreeing to dismiss counts II and III and recommend a sentencing cap of 20 years in prison. The trial court admonished defendant regarding the rights he would give up by pleading guilty. Defendant pleaded guilty and the court ordered the preparation of a presentence investigation report.

¶ 15 On May 2, 2013, new counsel entered his appearance on behalf of defendant. That same day, defendant filed a motion to withdraw his plea, alleging it was entered involuntarily because he was not aware of recent case law supporting his motion to suppress and was deprived of his right to the effective assistance of trial counsel. Defendant alleged he was not aware of *Jardines* when he pleaded guilty. He also alleged, at the time of his plea, neither he nor his counsel, LeRoy Cross, were aware of *People v. Lenyoun*, 402 Ill. App. 3d 787, 932 N.E.2d 63 (2010), and Cross—aside from arguments addressing the constitutionality of the open-air sniff—failed to make any arguments regarding the sufficiency of the complaint and affidavit in support of the search warrant. Defendant attached an affidavit to the motion in which he stated he would not have pleaded guilty if he had been aware of *Jardines* and *Lenyoun*.

¶ 16 On May 14, 2013, defendant filed a supplement to the motion to withdraw his

guilty plea, reiterating and expanding on the allegations in the original motion. Attached to the supplement was an affidavit from defendant's original defense counsel, Cross, who had represented defendant through the entry of his guilty plea. In it, Cross notes his awareness of *Jardines* and states he did not litigate any motion to suppress evidence after the United States Supreme Court released the *Jardines* opinion, but he did file a motion to reconsider the earlier denial of defendant's motion to suppress. Cross also stated he had no knowledge of the *Lenyoun* decision.

¶ 17 On May 17, 2013, the trial court sentenced defendant to 20 years' imprisonment, followed by 3 years' mandatory supervised release.

¶ 18 On May 28, 2013, the trial court held a hearing on defendant's motions to withdraw his guilty plea, which it denied. The court concluded, even without the open-air sniff, the information in the complaint and affidavit for the search warrant was sufficient to establish probable cause to search the Sherwood Terrace residence. Defendant's motion to suppress, according to the court, would not have been well taken even if the opinions in *Jardines* and *Lenyoun* had been argued because the other information in the complaint was sufficient to establish probable cause. The court also concluded Cross's failure to argue *Lenyoun* was not below an objective standard of reasonableness and defendant was not prejudiced by the alleged deficiency in Cross's performance, particularly in light of the potential punishment defendant faced for the amount of drugs he possessed. Defendant appealed the court's ruling on the ground the trial court failed to consider his motion to reconsider his sentence; this court affirmed in *People v. Palmer-Smith*, 2015 IL App (4th) 130451, 29 N.E.3d 95.

¶ 19 In February 2015, defendant filed a *pro se* petition for postconviction relief pursuant to the Act (725 ILCS 5/122-1 to 122-7 (West 2014)). Defendant alleged his plea was involuntary and he was denied his right to the effective assistance of counsel at trial. He asserted,

but for Cross's errors, his motions to suppress may have been granted and he would not have pleaded guilty. Defendant also argued he was denied the effective assistance of postconviction counsel when counsel failed to argue ineffective assistance of trial counsel on direct appeal. That same month, the trial court summarily dismissed defendant's postconviction petition, finding it frivolous and patently without merit.

¶ 20 This appeal followed.

¶ 21 II. ANALYSIS

¶ 22 Defendant argues the trial court erred in dismissing his postconviction petition, claiming he presented the gist of a constitutional claim, as follows: (1) his attorney, Cross, was ineffective for failing to make use of *Jardines* or *Lenyoun* to argue for the suppression of evidence; and (2) his appellate counsel was ineffective for failing to argue ineffectiveness of trial counsel on direct appeal. We disagree.

¶ 23 The Act "provides a mechanism for criminal defendants to challenge their convictions or sentences based on a substantial violation of their rights under the federal or state constitutions." *People v. Morris*, 236 Ill. 2d 345, 354, 925 N.E.2d 1069, 1075 (2010). A proceeding under the Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *People v. English*, 2013 IL 112890, ¶ 21, 987 N.E.2d 371. The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008).

¶ 24 The Act provides a three-stage process for adjudicating a postconviction petition. *English*, 2013 IL 112890, ¶ 23, 987 N.E.2d 371. 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 2014). The Illinois 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.

¶ 25 Our supreme court has also noted a postconviction petition "need present only a limited amount of detail and is not required to include legal argument or citation to legal authority." *People v. Brown*, 236 Ill. 2d 175, 184, 923 N.E.2d 748, 754 (2010). Moreover, "[t]he allegations of the petition, taken as true and liberally construed, need only present the gist of a constitutional claim." *Brown*, 236 Ill. 2d at 184, 923 N.E.2d at 754.

¶ 26 "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 2014). 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 2014). 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.

¶ 27 Traditionally, to establish ineffective assistance of counsel, a defendant must show (1) that his counsel's representation fell below an objective standard of reasonableness; and (2) but for counsel's errors, there is a reasonable probability the result of the trial would have

been different. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984). However, the Illinois Supreme Court has indicated, in the context of first-stage postconviction proceedings, a defendant need not conclusively establish these factors; in *Hodges*, our supreme court held "a petition alleging ineffective assistance may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *Hodges*, 234 Ill. 2d at 17, 912 N.E.2d at 1212.

¶ 28 We do not find it is arguable defendant was prejudiced by counsel's purported failure to relitigate the motion to suppress and argue *Jardines* and cite *Lenyoun* because, even without the open-air sniff, probable cause for the search warrant for the Sherwood Terrace residence was otherwise established.

¶ 29 Probable cause exists where, given the circumstances set forth in the affidavit, "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). Whether probable cause exists depends on the totality of circumstances known to an affiant at the time he or she is seeking a warrant. *People v. McCarty*, 223 Ill. 2d 109, 153, 858 N.E.2d 15, 41-42 (2006). In other words, probable cause exists when the circumstances known to the affiant are "sufficient to warrant a person of reasonable caution to believe that the law was violated and evidence of it is on the premises to be searched." *People v. Griffin*, 178 Ill. 2d 65, 77, 687 N.E.2d 820, 829 (1997).

¶ 30 In the case *sub judice*, the Sherwood Terrace affidavit stated a criminal informant had provided the Champaign police department with information concerning the sale of illegal substances. The information provided was consistent with other sources of information. On March 8, 2012, the informant told Christian about a source from whom she had bought cocaine on at least 30 occasions, later identified as defendant. The informant stated the source conducted

transactions at various locations, but always from a gold Buick.

¶ 31 The affidavit states the police conducted four controlled purchases of cocaine between the informant and defendant. Around the same time, according to the affidavit, officers had been conducting surveillance on defendant and observed him utilizing the Sherwood Terrace residence. Prior to completing each of the final three of the four controlled purchases, defendant was observed leaving the Sherwood Terrace residence. In April 2012, the affidavit states Christian obtained a warrant to place a GPS tracker on defendant's Buick and began tracking his movements, which confirmed defendant's consistent use of the Sherwood Terrace residence. Defendant generally arrived at the residence in the early morning and did not leave for hours.

¶ 32 The affidavit stated, "based on the information obtained from [the criminal informant], along with the monitoring of said GPS tracking device and visual surveillance," officers believed defendant possessed crack cocaine in the Sherwood Terrace residence. The affidavit states Christian, "based on his training and experience," knew drug dealers used residences as "safe houses" to elude police and avoid being robbed, and he believed defendant was using the Sherwood Terrace residence as a "safe house." Following these facts, the affidavit discussed the use of drug-sniffing dogs at the Sherwood Terrace residence. A small fraction of the 17-paragraph affidavit is committed to the open-air sniff.

¶ 33 Accordingly, we agree with the trial court's statement at the hearing on defendant's motion to reopen his July and August 2012 motions to suppress: "two paragraphs [of the complaint and affidavit for search warrant] concerning the dog sweep didn't add that much to the search warrant. That the search warrant, based upon the affidavit and the [preceding] paragraphs *** provided enough probable cause to effectuate the issuance of the search warrant."

¶ 34 Defendant suffered no prejudice as a result of any purported deficiencies in his

trial counsel's representation. As a result, we need not address the alleged deficiencies in trial counsel's or postconviction counsel's representation of defendant.

¶ 35 III. CONCLUSION

¶ 36 We affirm the judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 37 Affirmed.