2014 IL App (5th) 120156-U

NO. 5-12-0156

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Effingham County.
	)	
v.	)	No. 09-CF-249
	)	
MICHAEL MATLOCK,	)	Honorable
	)	Ericka A. Sanders,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Presiding Justice Welch and Justice Stewart concurred in the judgment.

ORDER

¶ 1 *Held*: As there are no nonfrivolous, meritorious arguments to be made on the defendant's behalf regarding the summary dismissal of his postconviction petition, the Appellate Defender's motion to withdraw from representation is granted, and the judgment of the circuit court, summarily dismissing the defendant's postconviction petition at the first stage, is affirmed.

¶ 2 The defendant, Michael Matlock, appeals the circuit court's first-stage dismissal of his petition for postconviction relief. The State Appellate Defender (Appellate Defender) has been appointed to represent him. The Appellate Defender has filed a motion to withdraw as counsel, alleging that there is no merit to the appeal. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *People v. McKenney*, 255 Ill. App. 3d 644 (1994). The

defendant was given proper notice and an extension of time to file briefs, memoranda, or other documents demonstrating why the judgment should not be affirmed and why counsel should not be permitted to withdraw. The defendant has submitted a response. Upon examination of the entire record, the motion of the State Appellate Defender (Appellate Defender), and the response of the defendant, we find no error or potential grounds for appeal. Therefore, we now grant the motion of the State Appellate Defender to withdraw as counsel and affirm the judgment of the circuit court of Effingham County based on the following.

¶ 3 BACKGROUND

¶ 4 An extensive discussion of the facts of this case is unnecessary; however, we will present the procedural history that is relevant to our decision. On November 25, 2009, the defendant was charged with unlawful possession of methamphetamine, pursuant to section 60 of the Methamphetamine Control and Community Protection Act (Act) (720 ILCS 646/60(a)(1) (West 2008)), and possession of methamphetamine-manufacturing material, pursuant to section 30 of the Act (720 ILCS 646/30 (West 2008)). After a jury trial, a guilty verdict was rendered on both counts. The defendant was sentenced to concurrent terms of 8 years for the possession charge and 15 years for the manufacturing materials charge. Before sentencing, the defendant, through his attorney, filed a motion for a new trial, which alleged that (1) "[t]he State failed to prove the Defendant guilty of the charges against him beyond all reasonable doubt"; (2) "[t]he Court erred in granting the State's Motion to Allow Evidence of Other crimes or Offenses because testimony from Nicholas McCarty that several months prior to the Defendant's arrest, he was

providing pseudoephedrine pills to the Defendant and in return would receive cash and/or meth for providing said pills was highly prejudicial to the defendant and denied him a fair trial"; (3) "[t]he Court erred by not allowing the defendant to question potential jurors during voir dire regarding their feelings about the legalization of marijuana"; (4) "[t]he Court erred by denying the Defendant's request to use 10 peremptory strikes per 725 ILCS 5/115-4(e)"; (5) "[t]he Court erred in denying the Defendant's motion for a directed verdict of not guilty at the close of the State's evidence and again at the close of the Defendant's evidence"; (6) "[t]he Court erred by failing to *** permit certain testimony where an offer of proof was made to wit: Andrea [Aanas][1] received a photograph, from a neighbor of the same apartment building, of a blonde haired male in his early to mid twenties fitting the description of Nicholas McCarty that had asked another tenant in that apartment building to let him into apartment #13 just days prior to the burglary"; (7) "[t]he verdict is based upon evidentiary facts which do not exclude every reasonable hypothesis consistent with the innocence of the Defendant"; and (8) "[t]he State failed to prove every material allegation of the Indictment beyond a reasonable doubt; specifically, the knowledge and possession element."

¶ 5 The court denied the motion. However, the defendant had also filed, *pro se*, an "amendment to motion for new trial." In it, he alleged that trial counsel was ineffective or negligent in not calling witnesses, not speaking with witnesses, not properly

[1]In this filing, the name was spelled "A-n-n-e-s"; however, throughout the record, it is spelled "A-a-n-a-s."

questioning witnesses, precluding testimony with a motion *in limine* that, in the defendant's view, would have been helpful, and not properly objecting to certain testimony. The defendant also argued that the court erred in granting a continuance, that the State presented perjured testimony, that the court erred in excluding certain testimony, and that the State concealed evidence. The court granted a hearing on the defendant's amended motion and appointed different counsel. After the hearing, the court denied the defendant's amended motion.

¶ 6 The court found that the majority of the testimony that could have been offered by witnesses that were not called by trial counsel concerned where the defendant was staying and was likely irrelevant as it pertained to times other than the time of the arrest, November 25, 2009. The court therefore determined that trial counsel's decision to not call particular witnesses and to not ask particular questions of witnesses was simply trial strategy, which the court said it would not second-guess.

¶ 7 On direct appeal, the defendant raised only the following issues: (1) that he was not proved guilty beyond a reasonable doubt, (2) that the jury was given an erroneous jury instruction, and (3) that he was improperly given an extended-term sentence. This court affirmed the defendant's conviction, but reduced his sentence to the nonextended term of five years' imprisonment. *People v. Matlock*, 2013 IL App (5th) 110160-U, ¶ 22.

¶ 8 On December 11, 2011, the defendant filed a petition for postconviction relief in which he alleged the following: (1) the search of 105 W. Jefferson, where the materials for which the defendant was charged were located, was unreasonable, (2) his fifth amendment rights were violated by the redacted version of his statement to police which

was admitted into evidence, (3) trial counsel was ineffective in questioning and calling witnesses, (4) trial counsel was ineffective for waiving his right to a speedy trial, and (5) the imposition of a term of mandatory supervised release (MSR) was unconstitutional. The circuit court summarily dismissed the petition on March 5, 2012. It found that "[w]ith regard to all of the arguments concerning the trial, the vast majority of Defendant's arguments are either barred by the doctrine of *res judicata* or have been waived." The court noted that the defendant's direct appeal was still pending, but that the defendant had "filed a lengthy and detailed post-trial motion in which he alleged the same arguments that he now seeks to advance in his post-conviction petition." The court determined that the defendant's claims of ineffective assistance were barred by the doctrine of *res judicata*. With regard to the remaining issues, the court found that the defendant's factual allegations were conclusory and that his legal arguments were wholly unsupported.

¶ 9 ANALYSIS

¶ 10 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2010)) allows an individual convicted of a criminal offense to challenge the proceeding in which he or she was convicted under the United States or Illinois Constitution or both. *People v. Cathey*, 2012 IL 111746, ¶ 17 (quoting *People v. Harris*, 224 Ill. 2d 115, 124 (2007)). A petition for relief under the Act may be summarily dismissed "[w]ithin 90 days after [its] filing" (725 ILCS 5/122-2.1(a) (West 2010)) if it is " 'frivolous or is patently without merit.' " *Cathey*, 2012 IL 111746, ¶ 17 (quoting 725 ILCS 5/122-2.1(a)(2) (West 2006)). "A postconviction petition is considered frivolous or patently without merit only if it has

no 'arguable basis either in law or in fact.' " *Id.* (quoting *People v. Hodges*, 234 Ill. 2d 1, 16 (2009)). "A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. Additionally, absent an allegation of ineffective assistance of appellate counsel for failing to raise an issue (see *People v. Turner*, 187 Ill. 2d 406, 412-13 (1999)), "where a person convicted of a crime has taken an appeal from the judgment of conviction on a complete record, the judgment of the reviewing court is *res judicata* as to all issues actually decided by the court" (*People v. Kamsler*, 39 Ill. 2d 73, 74 (1968) (citing *People v. Armes*, 37 Ill. 2d 457, 458 (1967))), and "issues that could have been raised on direct appeal, but were not, are considered forfeited and, therefore, barred from consideration in a postconviction proceeding." *People v. Youngblood*, 389 Ill. App. 3d 209, 214 (2009) (citing *People v. Blair*, 215 Ill. 2d 427, 443-44 (2005)). The appellate court will review a circuit court's order summarily dismissing a *pro se* postconviction petition *de novo*. *Cathey*, 2012 IL 111746, ¶ 17 (citing *People v. Coleman*, 183 Ill. 2d 366 (1998)).

¶ 11 The Appellate Defender first argues that no colorable argument can be made that the search of the apartment on Jefferson Street violated the defendant's fourth amendment rights. The Appellate Defender, citing *People v. Brown*, 327 Ill. App. 3d 816, 821 (2002), points out that "if [the defendant's] claim that he no longer lived at the apartment is true, he does not have standing to challenge the search." We do not accept the Appellate Defender's blanket statement that lack of residency automatically equates to lack of standing. See *People v. Johnson*, 237 Ill. App. 3d 860 (1992) (defendant had

standing to challenge validity of search warrant which authorized search of friend's residence although defendant did not own or lease residence and testified that he did not stay overnight at residence, and he had a legitimate expectation of privacy in the premises because of storage of his possessions there and his ready access to the property); see also *People v. Harre*, 263 Ill. App. 3d 447, 452-53 (1994) (finding no standing but discussing *Minnesota v. Olson*, 495 U.S. 91 (1990), *People v. Bookout*, 241 Ill. App. 3d 72 (1993), *People v. Johnson*, 237 Ill. App. 3d 860 (1992), and *People v. Olson*, 198 Ill. App. 3d 675 (1990), in which standing was found absent residency). However, we need not address the issue of standing, because the defendant was subject to a warrantless search without suspicion based on his MSR status. *People v. Wilson*, 228 Ill. 2d 35, 52 (2008) (quoting *Samson v. California*, 547 U.S. 843, 857 (2006)). Additionally, we note that section 3-3-7(a)(10) of the Unified Code of Corrections makes it a condition of MSR that one "consent to a search of his or her person, property, or residence under his or her control." 730 ILCS 5/3-3-7(a)(10) (West 2010). Moreover, this issue was forfeited as it was not raised on direct appeal and the defendant did not allege ineffective assistance of appellate counsel. We therefore agree with the Appellate Defender that no nonfrivolous argument can be made on the defendant's behalf relating to the constitutionality of the search.

¶ 12 The Appellate Defender next argues that no nonfrivolous argument can be made on the defendant's behalf with regard to his allegations pertaining to the redacted CD which contained his statement to the police. In his petition, the defendant argued that the recording of his statement began at the apartment rather than at the police department. He also claimed that he did not make any statements to the police after being advised of

his *Miranda* rights. Rather, he claimed that the police doctored the tape so his statements would appear to have been made after receiving the *Miranda* warnings. However, he failed to support these claims in any way. As the Appellate Defender points out, summary dismissal of a petition for postconviction relief is appropriate when it is "unsupported by 'affidavits, records, or other evidence.' " *People v. Collins*, 202 Ill. 2d 59, 66 (2002) (quoting 725 ILCS 5/122-2 (West 2000)). Moreover, this issue was forfeited as it was not raised on direct appeal and the defendant has not alleged ineffective assistance of appellate counsel.

¶ 13 The Appellate Defender next asserts that no meritorious argument can be made regarding the defendant's postconviction allegations of ineffective assistance of trial counsel based on trial counsel's not calling certain witnesses and not presenting additional questions. Because the defendant did not raise the issue on direct appeal or allege ineffective assistance of appellate counsel in his postconviction petition, we find the issue forfeited.

¶ 14 The Appellate Defender next argues that it cannot make a nonfrivolous, meritorious argument that the defendant's trial counsel was ineffective for waiving his speedy trial rights. We agree. This issue was not raised on direct appeal, and the defendant has not alleged ineffective assistance of appellate counsel. Moreover, the record reveals that the defendant consented to the waiver.

¶ 15 Finally, the Appellate Defender argues that the position taken by the defendant in his postconviction petition, that MSR is unconstitutional, is wholly without merit. We agree. In this regard, the defendant seemed to be redesigning his argument that the

search of the apartment was unreasonable because it is unreasonable for the police to use MSR to circumvent the warrant requirement; however, in light of our supreme court's decision in *Wilson*, the defendant's position is untenable.

¶ 16 CONCLUSION

¶ 17 The motion of the Appellate Defender to withdraw is granted, and the judgment of the circuit court is affirmed.

¶ 18 Motion granted; judgment affirmed.