2021 IL App (4th) 200438-U

NO. 4-20-0438

FILED
December 30, 2021
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
KEITH K. GREEN,	)	No. 18CF748
Defendant-Appellant.	)	
	)	Honorable
	)	John Casey Costigan,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Presiding Justice Knecht and Justice Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed the trial court's judgment because defendant's postconviction claim was barred by *res judicata*.

¶ 2 In July 2019, a jury found defendant, Keith K. Green, guilty of delivery of more than 1 gram but less than 15 grams of cocaine (720 ILCS 570/401(c)(2) (West 2018)). The trial court later sentenced him to 13 years in prison.

¶ 3 Defendant appealed, arguing, among other things, that the trial court erred by not appointing new counsel to litigate defendant's posttrial claims of ineffective assistance of counsel when the court's *Krankel* inquiry (see *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984)) showed possible neglect of his case. In December 2021, this court affirmed his conviction. See *People v. Green*, 2021 IL App (4th) 200234-U.

¶ 4 In June 2020, defendant *pro se* filed a petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2018)), asserting seven claims. One of those

claims (and the only claim defendant raises here), was defendant's allegation that trial counsel provided ineffective assistance by failing to investigate and call Ashley Melton as a witness at trial. In August 2020, the trial court summarily dismissed defendant's petition, finding that it was frivolous and patently without merit.

¶ 5 Defendant appeals, arguing only that the trial court erred by summarily dismissing his postconviction petition because it stated an arguable claim that trial counsel was ineffective for not investigating Melton as a witness. We disagree and affirm.

¶ 6 I. BACKGROUND

¶ 7 Our order in defendant's direct appeal presents a detailed factual background of this case. See *Green*, 2021 IL App (4th) 200234-U. Because our resolution of this appeal relies solely on the preclusive effect of our order in that case, we set forth only the facts necessary to an understanding of defendant's claim that trial counsel was ineffective for not investigating Melton as a witness.

¶ 8 A. Defendant's Conviction and Direct Appeal

¶ 9 In July 2019, a jury found defendant guilty of delivery of more than 1 gram but less than 15 grams of cocaine. The trial court later sentenced defendant to 13 years in prison. In August 2019, defendant moved for a new trial, which the court denied. Defendant then *pro se* alleged ineffective assistance of counsel, prompting the court to conduct a *Krankel* hearing. Relevant to this appeal, defendant claimed trial counsel did not conduct a sufficient investigation of Ashley Melton—namely, he failed to interview or call her to testify.

¶ 10 In December 2019, the trial court entered a written order disposing of defendant's ineffective assistance claims because, in part, "[d]efendant's counsel stated that all of these [potential] witnesses['] testimony hurt [d]efendant's case." Accordingly, the court determined

defendant's claims "pertain[ed] to counsel's trial strategy."

¶ 11 On direct appeal, this court rejected defendant's argument that the trial court erred by not appointing new counsel to litigate defendant's *pro se* posttrial claim of ineffective assistance based on trial counsel's decision not to call or investigate Ashley Melton as a witness. *Id.* ¶ 110. The evidence presented at trial showed that Melton and defendant both told the police that she knew nothing about the drug transaction. *Id.* Defendant even gave this statement in a recorded interview that was later played for the jury. *Id.*

¶ 12 Ultimately, this court held in defendant's direct appeal that defense counsel's decision-making regarding Melton was sound trial strategy. First, Melton's statement to police was damaging to defendant's case. Second, if Melton changed her story and confessed to the crime, her credibility and defendant's credibility would be subject to impeachment because they had both previously told the police that Melton knew nothing about the crime. *Id.* Accordingly, we affirmed the trial court's decision. *Id.* ¶ 112.

¶ 13 B. Postconviction Proceedings

¶ 14 In June 2020, defendant *pro se* filed a postconviction petition raising, among other issues, a claim that trial counsel provided ineffective assistance by not calling or investigating Melton as a witness. Defendant's petition alleged that he had told trial counsel that Melton would have testified that she made the controlled buy. He supported this assertion with his own affidavit, stating "[defendant] spoke with Ashley Melton and she informed [him] that she was available to testify that she made a controlled buy from CS Haywood Harris."

¶ 15 In August 2020, the trial court summarily dismissed the petition in a written order, finding that those "issues were directly addressed" in the court's December 2019 order.

¶ 16 This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 Defendant appeals, arguing only that the trial court erred by summarily dismissing his postconviction petition because it stated an arguable claim that trial counsel was ineffective for not investigating Melton as a witness. We disagree and affirm.

¶ 19 A. The Applicable Law and Standard of Review

¶ 20 A postconviction proceeding is a collateral attack on a final judgment that permits an "inquiry into constitutional issues involved in the original conviction and sentence that have not been, and could not have been, adjudicated previously on direct appeal." (Internal quotation marks omitted.) *People v. Davis*, 2014 IL 115595, ¶ 13, 6 N.E.3d 709. "Accordingly, issues that were raised and decided on direct appeal are barred from consideration by the doctrine of *res judicata*; issues that could have been raised, but were not, are considered forfeited." *Id.* Importantly, "[a] defendant cannot overcome a *res judicata* bar simply by bolstering a previously rejected claim with additional evidence." *People v. Woods*, 2020 IL App (1st) 162751, ¶ 67.

¶ 21 We review *de novo* a first-stage dismissal of a petition under the Act. *People v. Sanders*, 2016 IL 118123, ¶ 31, 47 N.E.3d 237.

¶ 22 B. This Case

¶ 23 Defendant's claim here is nearly identical in content and form to his claim on direct appeal. On direct appeal, defendant argued, among other issues, that "counsel's admission that he did not interview [Melton] before deciding not to call her shows possible neglect of [defendant's] case, and the court erred in not appointing counsel to further litigate this claim." See Brief of Defendant-Appellant at 25, *Green*, 2021 IL App (4th) 200234-U. Here, defendant makes the same argument except with the additional allegation in his postconviction petition that he had "informed trial counsel that, if called, [Melton] would have testified that 'she made the

buy on July 23, 2018,' " (see page 12 of defendant's brief), an allegation which we note contradicts his testimony at the *Krankel* hearing.

¶ 24 Ultimately, defendant's affidavit does not change the fact that his claim relies solely on whether his counsel was ineffective for not calling Melton as a witness—who, as this court previously discussed, counsel had little reason to believe would change her previous statement, let alone testify that she committed the crime. Nor does it change that counsel clearly realized the damaging effect that a change in testimony would have had on Melton and defendant's credibility.

¶ 25 Because defendant's affidavit merely bolsters defendant's previously rejected claim, *res judicata* prohibits defendant from getting a second bite at the apple on postconviction review. See *Woods*, 2020 IL App (1st) 162751, ¶ 67.

¶ 26 III. CONCLUSION

¶ 27 For the reasons stated, we affirm the trial court's judgment.

¶ 28 Affirmed.