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2012 IL App (3d) 100604-U

Order filed February 29, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 13th Judicial Circuit,
Plaintiff-Appellee,)	La Salle County, Illinois,
)	
v.)	Appeal No. 3-10-0604
)	Circuit No. 01-CF-369
CHARLES BARTELS,)	
)	Honorable
Defendant-Appellant.)	Cynthia M. Raccuglia,
)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice Schmidt and Justice O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in dismissing defendant's postconviction petition without an evidentiary hearing where two of the claims were barred by the doctrine of *res judicata* and the third did not make a substantial showing of a constitutional violation.

¶ 2 Defendant, Charles Bartels, was convicted of three counts of unlawful delivery of a controlled substance (720 ILCS 570/401(d) (West 2000)). His conviction and sentence were affirmed on appeal. *People v. Bartels*, No. 3-05-0279 (2007) (unpublished order under Supreme

Court Rule 23). Thereafter, defendant filed a postconviction petition, which the trial court dismissed following a second-stage hearing. We affirm.

¶ 3

FACTS

¶ 4 Defendant was charged with one count of unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2000)) and three counts of unlawful delivery of a controlled substance (720 ILCS 570/401(d) (West 2000)). On April 30, 2002, defendant entered into a partially negotiated plea deal whereby he agreed to plead guilty to the three counts of unlawful delivery of a controlled substance, and in exchange the State would dismiss the other charge and agree to a 13-year sentencing cap. Defendant subsequently received concurrent sentences of 12 years for each count.

¶ 5 Following his sentencing, defendant filed a motion to withdraw the guilty plea. The trial court allowed the motion and the cause proceeded to trial, where a jury found defendant guilty of the three counts of unlawful delivery of a controlled substance and not guilty of unlawful possession of a controlled substance. The trial court sentenced defendant to concurrent terms of 28 years on each count.

¶ 6 Defendant filed a notice of appeal, and the Office of the State Appellate Defender was appointed to represent him. After a review of defendant's case, appellate counsel filed a motion to withdraw because counsel could find no arguable errors warranting a continuation of defendant's appeal. Defendant filed a lengthy response to the motion in which he argued, among other things, that (1) trial counsel was ineffective for failing to properly investigate and take pictures of the crime scene, and (2) his sentence was unconstitutional because the court imposed a greater sentence after he decided to go to trial. Appellate counsel's motion was granted, and defendant's conviction and sentence were affirmed. Thereafter, defendant filed a *pro se* postconviction petition. The trial court

dismissed defendant's petition at the second stage without an evidentiary hearing. Defendant appeals.

¶ 7

ANALYSIS

¶ 8 Defendant argues that the trial court erred in dismissing his postconviction petition without an evidentiary hearing where the petition and supporting documents made a substantial showing that: (1) defendant was denied the effective assistance of trial counsel when counsel failed to investigate and photograph the crime scene; (2) defendant's sentence was unconstitutional because it was greater than the sentence he would have received under a plea deal; and (3) defendant was denied the effective assistance of appellate counsel when counsel failed to raise the first two issues on direct appeal. We review a dismissal of a postconviction petition without an evidentiary hearing *de novo*. *People v. Hall*, 217 Ill. 2d 324 (2005).

¶ 9 A postconviction petition is a collateral attack on a prior conviction and sentence. *People v. Rissley*, 206 Ill. 2d 403 (2003). The scope of a postconviction proceeding is limited to constitutional matters that have not been, nor could have been, previously adjudicated. *Id.* Therefore, any issues that have previously been decided by a reviewing court are barred by the doctrine of *res judicata*. *Id.* Issues raised in a postconviction petition that stem from matters outside of the record, and thus could not have been brought on direct appeal, are not subject to the doctrine of *res judicata*. *People v. Coleman*, 267 Ill. App. 3d 895 (1994). A defendant is entitled to an evidentiary hearing only if the allegations set forth in the petition, as supported by the trial record or accompanying affidavits, make a substantial showing of a constitutional violation. *Rissley*, 206 Ill. 2d 403.

¶ 10

A. *Res Judicata* Claims

¶ 11 Here, two of defendant's arguments on appeal had been previously decided by this court in *Bartels*, No. 3-05-0279. In that case, the appellate defender filed a motion to withdraw in accordance with *Anders v. California*, 386 U.S. 738 (1967) because counsel had failed to find any arguable errors warranting a continuation of defendant's appeal. Defendant filed a response arguing, among other things, that his trial counsel was ineffective for not investigating and photographing the crime scene and that his sentence was unconstitutional because it was greater than the sentence he would have received under a plea deal. We granted counsel's motion to withdraw and affirmed defendant's conviction and sentence. *Bartels*, No. 3-05-0279. Because these issues were previously decided by this court, we find that they are now barred by the doctrine of *res judicata*. See *People v. Jones*, 2011 IL App. (1st) 092529.

¶ 12 B. Ineffective Assistance of Appellate Counsel

¶ 13 Defendant's third claim, that appellate counsel was ineffective for not raising the other two issues in this appeal, is not barred by *res judicata* because it stems from an issue that could not have been brought on direct appeal. See *People v. Terry*, 2012 IL App. (4th) 100205. Therefore, the question becomes whether defendant has made a substantial showing of a constitutional violation. In order to prove ineffective assistance of counsel, defendant must show that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. *People v. Albanese*, 104 Ill. 2d 504 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *People v. Haynes*, 192 Ill. 2d 437 (2000). Defendant must satisfy both prongs in order to prevail on a claim of ineffective assistance of counsel; however, if the claim can be disposed of on the ground that defendant did not suffer prejudice, a

court need not determine whether counsel's performance was deficient. *Id.*

¶ 14 We find that defendant cannot establish that there is a reasonable probability that but for appellate counsel's alleged error the result of the appeal would have been different. Defendant claims that appellate counsel was ineffective for failing to raise the issues of trial counsel's ineffectiveness and the constitutionality of his sentence. As we have already noted, these two issues were addressed and found without merit by this court in *Bartels*, No. 3-05-0279. Therefore, defendant cannot claim that appellate counsel's failure to raise the issues created a reasonable probability sufficient to undermine confidence in the outcome of defendant's appeal. Defendant's claim of ineffective assistance of appellate counsel failed to make a substantial showing of a constitutional violation.

¶ 15

CONCLUSION

¶ 16 The judgment of the circuit court of La Salle County is affirmed.

¶ 17 Affirmed.