2016 IL App (3d) 140401-U

Order filed July 26, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF ILLINOIS	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois.
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-14-0401 Circuit No. 02-CF-1019
ANTONIO M. BAILEY,	)	Honorable David A. Brown Judge, Presiding.
Defendant-Appellant.	)	

PRESIDING JUSTICE O'BRIEN delivered the judgment of the court.
Justices Holdridge and Lytton concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant did not receive ineffective assistance of trial, direct appeal or postconviction counsel. He is entitled to an additional day of credit for time served in presentence custody.

¶ 2 Defendant Antonio Bailey was convicted of first degree murder and sentenced to a 33-year term of imprisonment, with an additional 25 years' imprisonment for a firearm enhancement, for a total sentence of 58 years. The trial court dismissed his postconviction

petition without an evidentiary hearing. He appealed. We affirm the dismissal and remand for an additional day to be added to the credit Bailey received for time spent in presentence custody.

¶ 3 FACTS

¶ 4 Defendant Antonio Bailey was charged with two counts of first degree murder for the 2002 shooting death of Allen Bradley. 720 ILCS 5/9-1(a)(1), (2) (West 2002). At a 2003 jury trial, Bailey was found guilty and sentenced to a 33-year term of imprisonment. Bailey appealed and this court reversed Bailey's conviction and remanded the cause. *People v. Bailey*, No. 3-03-0740 (2005) (unpublished order under Supreme Court Rule 23). A new trial took place in 2006, the jury deadlocked, and the trial court declared a mistrial. Bailey was retried in 2007, and the following evidence was presented at the trial.

¶ 5 Several residents of the 1600 block of North Peoria in Peoria testified they heard gunshots around 9:15 p.m. on October 8, 2002. The police responded and discovered Bradley's body in the front yard at 1613 North Peoria. He had been shot in the back. A number of shell casings and bullets were discovered in the area.

¶ 6 The police were told by Martez Harris, who was in custody on an unrelated charge, that he had been with his friend Kory Bonds at Bonds's house on October 8 when Bailey came over with a gun. In his videotaped statement, Harris told the police that Bailey entered Bonds's house on North California during the evening of October 8. He was holding a black firearm with a wooden handle. The gun could be found in the basement at Bonds's house.

¶ 7 Using information gleaned from the interview, the police obtained and served a search warrant at Bonds's house. A black .380 caliber Taurus semiautomatic weapon, a black .32 caliber semiautomatic weapon, and ammunition were discovered at the house. The police also discovered a wallet from a robbery victim, court papers belonging to Kory Bonds and Bonds's

bail bond paperwork in an air duct along with a box of bullets. There were no fingerprints on any of the discovered items but ballistics tests revealed that the casings and projectiles found at the scene had been fired from the Taurus handgun.

¶ 8 Harris testified. He stated that although he remembered the shooting, he did not recall being at Bonds's house and denied that Bailey came over with a gun. He did not see Bailey at all the evening of the shooting. He acknowledged his earlier statement was inconsistent with his testimony but said he had signed two affidavits averring that the original statements were false and that he made them up because he disliked Bailey. He also wanted to get himself "out of trouble" on his pending armed robbery charge. His guilt caused him to recant the statements. He first recanted his videotaped statement in 2003. A redacted version of Harris's statement to the police was played for the jury.

¶ 9 Andrae Bowie testified that he saw Bailey on October 8 when Bowie was at his girlfriend's house on Peoria Street. Bowie and Bailey walked to the gas station and were approached by a man in the alley. Bowie heard gunshots and fled. Neither he nor Bailey fired a weapon. Bailey did not chase the other man. He initially gave the police a different version of the events. Bowie told the police that he had seen Bailey with the gun at Bonds's house and saw him shoot Bradley in the alley. He talked to Harris while both men were in the county jail and then gave a new version. He explained that he and Harris made up the story about Bailey. Bowie did so in hope that unrelated charges that were pending against him would be dropped. Bowie's videotaped statement to the police was also played for the jury. In the statement, he told officers that he had seen Bailey shoot Bradley.

¶ 10 DeMarshall Johnson testified that he lived near the 1600 block of North Peoria in October 2002, and knew both Bradley and Bailey. Johnson and Bailey's brother, Shane

Williams, had bought a black .380 handgun, which Johnson gave to Bailey the day Bradley was killed. After the shooting, Bailey told Johnson that "the dude wouldn't get against the wall; it was a stickup," and that when Bradley walked away, Bailey shot him. Johnson was facing federal charges and agreed to help the State on this case as part of his federal plea. He hoped his testimony would help toward a reduction in his federal sentence. He denied that he told a fellow inmate, Gregory Sanford, that he would testify against anyone if it would reduce his sentence.

¶ 11 Johnson did not share the information about the shooting with the police until 2007, despite being questioned at the time of the shooting. He stated that there was no need to inform the police because "somebody else had already told them before, so I didn't have to tell them." He also explained, "Why would I? He was already locked up for it." Johnson further said, "I mean, he was already in the penitentiary for being found guilty on the case from two other people who-." In response to defense counsel's reiteration that Johnson failed to say anything to the police after he was arrested on a parole hold, Johnson said, "He was already in jail." Defense counsel repeated, "You didn't say anything, you're facing 10 to life with the federal government?" to which Johnson said, "Because these whole times when I'm getting picked up on these charges, he already been found [interruption by defense counsel] on the crime." Defense counsel did not object to any of Johnson's statements.

¶ 12 A sidebar took place where the trial court inquired if either attorney wanted to say anything about Johnson's testimony that Bailey had been tried previously and was in the Illinois Department of Corrections (DOC). Defense counsel responded that he had not inquired of Johnson about Bailey's prior trials or conviction and that the testimony was not solicited by the defense. After discussion with Bailey, counsel opted not to move for a mistrial in an attempt to avoid drawing the jury's attention to the improper comments. Counsel also stated that further

attention would be directed toward the improper statements if the trial court instructed the jury regarding the statements.

¶ 13 The State rested and Bailey moved for a directed verdict, which was denied. Sanford testified for the defense. He was in the DOC on a sentence for aggravated robbery and had been in jail with Johnson. He said that Johnson had told him that the federal authorities wanted Johnson to tell on someone and that he agreed as long as it was not against his family. Williams also testified. He was Bailey's brother, that he knew Johnson but was no longer friends with him, and that he did not buy a gun with Johnson in 2002. He did not talk to Johnson about a gun or about Bailey.

¶ 14 The jury was instructed and given verdict forms for murder and a special interrogatory asking whether the State had proved beyond a reasonable doubt that Bailey had personally discharged a firearm causing Bradley's death. Defense counsel did not object to the instruction. The jury returned a guilty verdict and answered the special interrogatory in the affirmative, finding that the State had proved the additional factor regarding the personal discharge of a firearm resulting in death.

¶ 15 At the sentencing hearing, the State argued it could seek a 25-to-life enhancement based on the special interrogatory regarding discharge of a firearm. Defense counsel argued that the trial court was limited to imposing a 33-year sentence to which Bailey was sentenced at the first trial, noting the State had not sought an enhanced sentence at the first or second trials. The trial court agreed with the State and found that the enhancement was applicable. Bailey did not present any evidence in mitigation or aggravation. The trial court imposed a 33-year sentence on the murder charge, finding it to be "fair and appropriate" and a proper starting point. It added a

25-year enhancement, finding it was "mandated to add" the enhanced term, resulting in a 58-year term of imprisonment.

¶ 16 This court affirmed Bailey's conviction and sentence, finding that there were no trial errors and that because the original sentence was void due to lack of enhancement, it could be increased at the third trial. *People v. Bailey*, No. 3-07-0826 (2010) (unpublished order under Supreme Court Rule 23). Bailey filed a *pro se* postconviction petition, in which he alleged, in part, that he was provided ineffective assistance of both trial and appellate counsel by the failure to object to the submission of the special interrogatory and Johnson's testimony that Bailey had already been convicted of murder and by postconviction counsel's failure to amend Bailey's petition to include the claims. Counsel was appointed to represent him in 2011. Postconviction counsel filed an Illinois Supreme Court Rule 651(c) certificate in 2013. Counsel did not amend or supplement Bailey's *pro se* petition. The State sought dismissal of the petition, which the trial court granted after a hearing. Bailey appealed.

¶ 17 ANALYSIS

¶ 18 There are three issues on appeal: whether the trial court erred when it dismissed without a hearing Bailey's claims of ineffective assistance of trial and appellate counsel; whether postconviction counsel provided unreasonable assistance of counsel; and whether Bailey is entitled to additional credit for time served in presentence custody.

¶ 19 We turn to Bailey's first argument. He asserts dismissal of his postconviction petition without an evidentiary hearing was in error where he made a substantial showing of ineffective assistance of both trial and appellate counsel and unreasonable assistance of postconviction counsel. He argues trial counsel failed to object to the testimony of witness Johnson that Bailey

had already been found guilty of Bradley's murder and was in the DOC and that appellate counsel failed to raise the error on direct appeal.

¶ 20 Postconviction proceedings address allegations of constitutional deprivations that occurred at trial and could not and were not previously determined. 725 ILCS 5/122-1 (West 2012); *People v. Richardson*, 189 Ill. 2d 401, 407 (2000). There are three stages of postconviction proceedings; at the second stage the State must answer the petition or move to dismiss. *People v. Lacy*, 407 Ill. App. 3d 442, 455 (2011). When the State moves to dismiss a postconviction petition at the second stage of postconviction proceedings, the allegations in the petition are assumed true and the challenge is only to their legal sufficiency. *People v. Miller*, 203 Ill. 2d 433, 437 (2002). Dismissal is proper only when the factual allegations in the petition, liberally construed in the petitioner's favor and in light of the original trial record, fail to make a substantial showing that the defendant has suffered a constitutional deprivation. *People v. Coleman*, 183 Ill. 2d 366, 382 (1998). This court reviews *de novo* a trial court's dismissal of a postconviction petition at the second stage. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006).

¶ 21 A criminal defendant is entitled to effective assistance of trial counsel. U.S. Const. amends. VI, XIV; Ill. Const. 1970, art. I, § 8. Trial counsel is ineffective where (1) his performance was deficient and (2) the deficient performance prejudiced the defendant such that he was denied a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Albanese*, 104 Ill. 2d 504, 525-26 (1984). A defendant is also entitled to effective assistance of counsel on direct appeal. *People v. Logan*, 224 Ill. App. 3d 735, 739 (1991). Appellate counsel provides ineffective assistance when he fails to raise meritorious arguments. *Id.*

¶ 22 At trial, the following colloquy took place between Johnson and defense counsel:

"Q. Okay. So after this five-year hiatus when you have other things going on, you choose that you're not gonna say anything to anybody about the fact that somebody came up to you and admitted they killed someone?

A. Why would I? He was already locked up for it.

Q. Because it couldn't help you; right?

A. I mean, he was already in the penitentiary for being found guilty on the case from two other people who –

Q. Well apparently – hold on a second. Apparently on the date that you talked to him, that was the date after he murder; correct?

A. Yeah.

Q. So, if you're talking about Antonio Bailey, Antonio Bailey wasn't in custody on October 11th?

A. Okay.

Q. When he talked to you, he wasn't in custody, correct?

A. Yeah.

Q. So you choose to do nothing with that?

A. Yeah.

Q. And you just decide to sit on it, but now –

A. I chose to do nothing because I had a warrant at the time too. I had a D.O.C. warrant. So, I wasn't fitting to call the police and get myself locked up.

***

Q. Okay. After your conversation with Tony, you just left it alone, he left you, you left him, and that was it?

A. Yeah.

Q. And subsequently you get picked up on a parole hold?

A. A year and a half later.

Q. And in the meantime then, you don't say anything to the police about this information you had?

A. He was already in jail.

Q. I'm just asking you. Did you say anything to the police after you got picked up?

A. No.

Q. And you didn't say anything to the police when you got picked up on any of your misdemeanors?

A. No.

Q. You didn't say anything, you're facing 10 to life with the federal government?

A. Because these whole times when I'm getting picked up on these charges, he already been found –

Q. I'm asking you a question.

A. On the crime.

Q. I'm asking you a question."

¶ 23 In response to the trial court's inquiry outside the jury's presence regarding the testimony, defense counsel stated:

"Judge, my only feeling on that, certainly when these statements were made, they weren't in response to my direct questions. I never asked him anything regarding Mr. Bailey's – any prior hearings in this matter. I don't believe I even touched on that, nor did I ever attempt to elicit anything regarding him being found guilty or for the fact that there

was a hung jury previously in this case. They were all spontaneous remarks by the witness, I believe, to prejudice the jury and further his cause in federal court."

¶ 24 When the trial court asked what defense counsel wanted to do regarding the witness's statements, counsel answered:

"I've discussed with my client, your Honor, the possibility of requesting a mistrial and he does not want me to make that motion. I don't believe that there's any – anything that can be done. I think if anything's said to the jury at this time about it or later on, it's only gonna draw their attention to it further. Hopefully, it was glossed over. So, I mean, the horse is out of the barn at this time."

¶ 25 The trial court then directed that the parties refrain from bringing up the part of Johnson's testimony about Bailey's prior conviction and sentence for the instant offense.

¶ 26 We find that Bailey has waived this issue. At trial, after the objectionable testimony, the trial court inquired as to what Bailey wanted to do. Defense counsel discussed the matter with Bailey and responded to the trial court that Bailey did not want to pursue a mistrial and did not want to focus on the issue, concluding that "the horse was out of the barn." *People v. Bowens*, 407 Ill. App. 3d 1094, 1098 (2011) (issue is waived when trial counsel makes a strategic determination not to object to matters that would be objectionable). Any challenge to the propriety of Johnson's testimony was waived by Bailey when he opted not to pursue a mistrial.

¶ 27 Waiver notwithstanding, Bailey argues that counsel waited too long to end the cross-examination of Johnson and that the improper testimony should not have gone to the point where a mistrial was viable. Bailey's argument is not supported by the record. In the sidebar, defense counsel offered his reasoning regarding his cross-examination of Johnson and his attempts to impeach the witness with bias and lack of credibility. Counsel explained that he was attempting

to elicit testimony that Johnson waited to tell the police the information he had about the Bradley murder and that he only did so in order to get consideration on other charges in return. Defense counsel also tried to stress that Johnson was not answering the questions he was asked.

¶ 28 Counsel expressly indicated his continued questioning was a matter of trial strategy. The sidebar with the trial court established that counsel was aware of the prejudicial nature of the testimony and opted not to emphasize it with an objection. See *People v. Campbell*, 163 Ill. App. 3d 1023, 1031 (1987) (trial strategy could include ignoring objectionable statement on cross-examination). Counsel's tactical decision regarding Johnson's testimony was not so unreasonable as to amount of deficient representation. Because the underlying issue lacks merit, Johnson was not prejudiced by appellate counsel's failure to raise it on appeal. *People v. Childress*, 191 Ill. 2d 168, 175 (2000) (where the underlying issue is not meritorious, there is no prejudice to the defendant as a result of appellate counsel's failure to raise it on appeal). We consider that neither trial court nor appellate counsel provided ineffective assistance.

¶ 29 We now address whether the assistance provided by postconviction counsel was unreasonable. Bailey argues that postconviction counsel's failure to amend the postconviction petition to prevent the forfeiture of his claim of ineffective assistance of trial counsel based on trial counsel's failure to object to the firearm enhancement special interrogatory constituted unreasonable assistance of postconviction counsel in violation of Supreme Court Rule 651(c). Bailey further argues that to preserve the claim, postconviction counsel was required to amend his postconviction petition to include ineffective assistance of appellate counsel for failure to raise the issue on direct appeal, and that postconviction counsel's failure to do so was unreasonable assistance.

¶ 30 A petitioner in postconviction proceedings is entitled to reasonable assistance of counsel. *People v. Turner*, 187 Ill. 2d 406, 410 (1999) (quoting *People v. Owens*, 139 Ill. 2d 351, 364 (1990)). Rule 651(c) requires the petitioner's attorney to certify that he has "consulted with the petitioner *** to ascertain his or her contentions of deprivation of constitutional rights, has examined the record of the proceedings at the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions." Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984). Postconviction counsel must investigate and properly present the defendant's claims. *People v. Schlosser*, 2012 IL App (1st) 092523, ¶ 16. This responsibility includes making any amendments to the petition that are necessary to avoid procedural bars resulting in dismissal if not rebutted. *Schlosser*, 2012 IL App (1st) 092523, at ¶ 21 (quoting *People v. Perkins*, 229 Ill. 2d 34, 44 (2007).

¶ 31 A rebuttable presumption exists that postconviction counsel provided reasonable assistance when counsel files a Rule 651(c) certificate and it is the petitioner's burden to prove counsel did not comply with the Rule's requirements. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19. A petitioner must demonstrate that his *pro se* postconviction petition could have been amended to state a case on which relief could be granted. *People v. Wren*, 223 Ill. App. 3d 722, 731 (1992). The failure of postconviction counsel to amend a petition to avoid forfeiture may constitute unreasonable assistance. *Turner*, 187 Ill. 2d at 412-13. However, counsel's representation is not unreasonable where counsel chooses not to amend a *pro se* petition with claims that are without merit. *People v. White*, 198 Ill. App. 3d 781, 786 (1989). This court reviews *de novo* whether postconviction counsel's performance was unreasonable in violation of Supreme Court Rule 651(d). *People v. Suarez*, 224 Ill. 2d 37, 41-42 (2007).

¶ 32 On direct appeal, Bailey's counsel argued that the increased sentenced based on the firearm enhancement was improper but did not challenge trial counsel's failure to object to the special interrogatory. The charging instrument indicated use of a firearm and thus provided adequate notice to Bailey of the possibility of a sentence enhancement. See *People v. Jackson*, 2014 IL App (1st) 123258, ¶ 62 (language in indictment stating "pulled trigger of a firearm" provided notice of the basis of firearm enhancement). Because the special interrogatory was mandatory and necessary to sustain the firearm enhancement, trial counsel's only argument in opposition to the interrogatory would have been that the enhancement was improper. See *People v. Dixon*, 359 Ill. App. 3d 938, 940-41 (2005). This court found, to the contrary, that the firearm enhancement was not improper and affirmed the 25-year add-on on direct appeal. Thus, any argument based on the propriety of the special enhancement cannot stand.

¶ 33 Even if trial counsel provided deficient representation when failing to object to the special interrogatory, Bailey was not prejudiced. The firearm enhancement is mandatory; if the jury finds against the defendant, the trial court is required to impose it, and any sentence without it is void. Trial counsel and appellate counsel argued the propriety of the firearm enhancement and were unsuccessful. Postconviction counsel was not required to address meritless arguments. We find there is no merit to Bailey's assertion that he received unreasonable assistance of postconviction counsel for failing to amend the petition to add claims of ineffectiveness of appellate counsel for failing to challenge trial counsel's failure to object to the special interrogatory regarding the firearm enhancement. There was no issue to raise. Postconviction counsel did not fail to provide reasonable assistance.

¶ 34 The last issue we address is whether Bailey is entitled to additional credit for time served in presentence custody. Bailey argues that he is entitled to credit for 1,819 days spent in

presentence custody, from November 7, 2002, when he was arrested, to October 31, 2007, when he was sentenced. In his reply brief he concedes that October 31 does not count but maintains his presentence custody from November 7, 2002, to October 30, 2007, adds up to 1,819 days.

¶ 35 A defendant is entitled to credit for each day spent in presentence custody. 730 ILCS 5/5-8-7(b) (West 2008). Presentence custody is calculated from the day of arrest; however, the day of sentencing is calculated as part of the sentence term and is not considered presentence custody. *People v. Williams*, 239 Ill. 2d 503, 509 (2011). This court considers *de novo* whether a defendant is entitled to additional credit for time in presentence custody. *People v. Robinson*, 172 Ill. 2d 452, 457 (1996).

¶ 36 The mittimus reflects that Bailey was awarded presentence custody credit from November 8, 2002, when he was entitled to credit for November 7, 2002, the day he was taken into custody. Bailey was sentenced on October 31 and the mittimus issued that day. Bailey was transferred to the DOC on the day of sentencing and October 31 is counted as part of his sentence term. While Bailey agrees that October 31, 2007 is part of his sentence credit, he maintains that he is entitled to 303 days for 2007, bringing his presentence custody total to 1819. Bailey is correct. The days in custody were: 2003 – 365; 2003 – 366; 2005 – 365; 2006 – 365; and 303 from January 1, 2007 to October 30, 2007. We calculate that Bailey is entitled to 1,819 days of presentence custody. The mittimus should be amended to reflect a credit of 1,819 days.

¶ 37 In sum, we find Bailey was not deprived of effective assistance of trial or appellate counsel and did not receive unreasonable assistance of postconviction counsel. We further find that Bailey is entitled to an additional day of presentence custody credit.

¶ 38 For the foregoing reasons, the judgment of the circuit court of Peoria County is affirmed and the cause remanded with directions.

¶ 39 Affirmed and remanded with directions.