2016 IL App (4th) 140601-U

NO. 4-14-0601

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
June 15, 2016
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Vermilion County
STEPHEN COUCH,	)	No. 05CF503
Defendant-Appellant.	)	
	)	Honorable
	)	Derek J. Girton,
	)	Judge Presiding.

PRESIDING JUSTICE KNECHT delivered the judgment of the court.
Justices Turner and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: We grant OSAD's motion for leave to withdraw as counsel and affirm, finding no meritorious claims can be raised on appeal.

¶ 2 This case comes to us on a motion from the Office of the State Appellate Defender (OSAD). OSAD moves to withdraw as appellate counsel for defendant, Stephen Couch, arguing the potential issues raised on appeal are frivolous and without merit. We grant OSAD's motion and affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 We have addressed defendant's case on two prior occasions. See *People v. Couch*, 387 Ill. App. 3d 437, 899 N.E.2d 618 (2008) (*Couch I*); *People v. Couch*, 2012 IL App (4th) 100234, 970 N.E.2d 1270 (*Couch II*). We briefly address the facts relevant to each issue on this appeal.

¶ 5 On December 21, 2004, police arrested defendant pursuant to an arrest warrant.

On August 26, 2005, he was arraigned. At his arraignment, defendant was charged with "(1) criminal drug conspiracy [(count I)] (720 ILCS 570/405.1 (West 2004)), (2) three counts of delivery of a controlled substance (15 grams or more but less than 100 grams of a substance containing cocaine) [(count II through IV)] (720 ILCS 570/401(a)(2)(A) (West 2004)), and (3) delivery of cannabis (more than 30 grams but not more than 500 grams of a substance containing cannabis) [(count V)] (720 ILCS 550/5(d) (West 2004))." *Couch I*, 387 Ill. App. 3d at 439, 899 N.E.2d at 619-20.

¶ 6 In September 2007, a jury found defendant guilty on all counts. Defendant filed a motion for a new trial, which was denied. In October 2007, the trial court sentenced him to 26 years in prison on count II, 5 years on count III, 20 years on count IV, and 20 years on count V. Counts II and IV were to be served consecutively and the remaining counts were to be served concurrently.

¶ 7 On direct appeal, defendant claimed the trial court erred by (1) failing to instruct the jury on the entrapment defense and (2) imposing consecutive sentences against defendant. *Id*. at 443, 445, 899 N.E.2d at 623, 625. This court found the entrapment defense was not warranted and the sentence was proper. *Id.* at 445-46, 899 N.E.2d at 625.

¶ 8 In December 2009, defendant filed a postconviction petition alleging (1) his trial judge was biased against him; (2) the trial court failed to give the entrapment jury instruction; (3) an unreasonable delay occurred between his arrest and arraignment; and (4) he was improperly sentenced. The trial court dismissed his claim, finding it frivolous and without merit. Defendant only appealed the judicial bias claim. *Couch II*, 2012 IL App (4th) 100234, ¶ 6, 970 N.E.2d 1270. This court found his postconviction petition was frivolous and without merit because it failed to include any affidavits or evidence to support his claim. *Id.* ¶ 20. Defendant did not raise any other issues in his initial postconviction petition. *Id.* ¶ 6.

¶ 9 In April 2014, defendant filed the current postconviction petition, which was dismissed at the first stage as frivolous and without merit. In the trial court's May 2015 order, it concluded defendant argued actual innocence under both his entrapment and ineffective assistance of appellate counsel claims. Ineffective assistance and three other claims were considered under the "cause and prejudice" test as the basis for the successive filing. In June 2014, defendant filed a "petition for *mandamus*," effectively asking the trial court to reconsider its initial ruling on the first-stage dismissal of defendant's *first* postconviction petition. The trial court denied the petition. This appeal followed.

¶ 10 II. ANALYSIS

¶ 11 This court appointed OSAD to represent defendant on appeal. OSAD filed a motion and a brief seeking to withdraw. The record shows service of the motion on defendant. This court granted defendant until April 11, 2016, to file additional points and authorities. He filed none. We have examined the record and decided, as did OSAD, the case presents no colorable issues and the appeal is without merit.

¶ 12 In its motion to withdraw, OSAD raises six potential issues for our review: (1) the entrapment jury instruction; (2) an unconstitutional delay in determining probable cause; (3) an improper sentence; (4) ineffective assistance of appellate counsel; (5) improperly introduced eavesdropping evidence at trial; and (6) the denial of defendant's "petition for *mandamus*." OSAD finds each of these issues frivolous and without merit on appeal. We agree.

¶ 13 The Post-Conviction Hearing Act (Act) permits a defendant to argue the denial of constitutional rights resulted in his conviction. 725 ILCS 5/122-1(a)(1) (West 2014). A postconviction petition proceeds in three stages. At the first stage, the trial court reviews defendant's petition and determines whether the claim is frivolous and patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2014); *People v. Gaultney*, 174 Ill. 2d 410, 418, 675 N.E.2d

102, 106 (1996). Dismissal at the first stage is reviewed *de novo*. *People v. Harris*, 224 Ill. 2d 115, 123, 862 N.E.2d 960, 966 (2007).

¶ 14 Under the Act, only one postconviction petition should be filed. *People v. Pitsonbarger*, 205 Ill. 2d 444, 456, 793 N.E.2d 609, 619 (2002). Successive petitions may be filed only if (1) cause and prejudice is established for failing to raise the claim in an earlier proceeding or (2) a fundamental miscarriage of justice would otherwise occur. *Id*. at 459, 793 N.E.2d at 621.

¶ 15 A defendant establishes cause by showing his counsel's attempt to raise the issue on appeal or in a postconviction petition was impeded. *People v. Simpson*, 204 Ill. 2d 536, 552, 792 N.E.2d 265, 277 (2001). Prejudice is established by showing an "error so infected the entire trial that the defendant's conviction violates due process." *Id*. at 552, 792 N.E.2d at 278.

¶ 16 A fundamental miscarriage of justice requires the defendant to demonstrate actual innocence. *Pitsonbarger*, 205 Ill. 2d at 459, 793 N.E.2d at 621. Actual innocence requires proof (1) of newly discovered evidence, (2) material to the case, and (3) the new evidence is so conclusive it would likely change the result of defendant's trial. *People v. Edwards*, 2012 IL 111711, ¶ 32, 969 N.E.2d 829.

¶ 17 The trial court determined defendant's entrapment claim and part of his ineffective assistance claim argued actual innocence, while his remaining claims argued "cause and prejudice" as the basis for filing a successive postconviction petition. We agree with this interpretation and address each claim according to the applicable standard.

¶ 18 A. Entrapment

¶ 19 Defendant argues his entrapment jury instruction should have been given at trial. We disagree. If an issue is relitigated without presenting any newly discovered evidence, the doctrine of *res judicata* will bar its review. *People v. Blair*, 215 Ill. 2d 427, 443, 831 N.E.2d

604, 615 (2005) Postconviction petitions are subject to the limitations of *res judicata*. *Id*. at 445, 831 N.E.2d at 615.

¶ 20 In defendant's second postconviction petition, he argued actual innocence because he was entrapped. His petition claimed the trial court erred in refusing to instruct the jury about entrapment. Not only has defendant failed to provide newly discovered evidence to support his position, he has failed to point to any existing evidence in the record in support of this claim. See 725 ILCS 5/122-2 (West 2014) (requiring affidavits, record cites, or other evidence to support a postconviction claim).

¶ 21 Moreover, this is the third time defendant has raised the identical entrapment argument in an appeal or postconviction petition. *Couch I*, 387 Ill. App. 3d at 443-44, 899 N.E.2d at 623-24 (first argued); People v. Couch, Vermilion County Case No. 05-CF-503 (Mar. 9, 2010) (order dismissing defendant's first postconviction petition) (argued again). It is barred by *res judicata* and should not be raised again.

¶ 22 B. Delay Between Arrest Warrant and Arraignment

¶ 23 Defendant argues he was prejudiced by the delay between the issuance of his arrest warrant and his arraignment. We disagree. Defendant argued an unreasonable delay between his initial arrest and his arraignment in his initial postconviction petition. This argument is similar to his current argument alleging the identical issue. It is barred by *res judicata*.

¶ 24 Even if the current argument is sufficiently distinct from his prior argument, it is still without merit. Under the "cause and prejudice" test, cause may be established by showing a " 'factual or legal basis for a claim was not reasonably available to counsel' " at the time of the initial postconviction petition. *Pitsonbarger*, 205 Ill. 2d at 460, 793 N.E.2d at 622 (quoting *Strickler v. Greene*, 527 U.S. 263, 283 n.24 (1999)). Absent this justification, forfeiture bars any

claim that could have been raised in a prior postconviction petition. *Blair*, 215 Ill. 2d at 444-45, 831 N.E.2d at 615-16.

¶ 25 At the time of defendant's arraignment, he had all the information necessary to challenge the delay between the arraignment and his initial arrest warrant. No justification has been provided for failing to raise this issue in his posttrial motions or on appeal. It does not satisfy the "cause" prong of the "cause and prejudice" test and is forfeited.

¶ 26 C. Consecutive Sentences

¶ 27 Defendant contends he was improperly sentenced to consecutive terms of imprisonment for his crimes. We disagree. This issue was raised in defendant's direct appeal and his first postconviction petition. *Couch I*, 387 Ill. App. 3d at 445-46, 899 N.E.2d at 624-25 (first raised); People v. Couch, Vermilion County Case No. 05-CF-503 (Mar. 9, 2010) (order dismissing defendant's first postconviction petition) (raised again). This is the third time he has tried to argue the improper imposition of his sentence. *Res judicata* bars this claim. It should not be raised again.

¶ 28 D. Ineffective Assistance of Appellate Counsel

¶ 29 Ineffective assistance is a constitutional claim arising from the sixth amendment of the United States Constitution (U.S. Const., amend. VI). The sixth amendment provides defendants the right to counsel, which is interpreted to mean the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Appellate counsel is ineffective where counsel's performance (1) was deficient, and (2) prejudiced defendant. *People v. Petrenko*, 237 Ill. 2d 490, 496, 931 N.E.2d 1198, 1203 (2010). "Appellate counsel is not required to raise issues that he reasonably determines are not meritorious." *People v. English*, 2013 IL 112890, ¶ 34, 987 N.E.2d 371.

¶ 30 Defendant challenges issues his appellate counsel raised and failed to raise.

According to defendant, appellate counsel failed to adequately argue the entrapment jury instruction and defendant's consecutive sentences. We already determined both of these issues are barred by *res judicata* for being argued identically on direct appeal. On direct appeal, counsel fully explored both issues and made acceptable arguments for each. *Couch I*, 387 Ill. App 3d at 443-46, 899 N.E.2d at 623-25. Counsel was not ineffective on appeal with respect to these two issues.

¶ 31 This argument and any other arguments with respect to appellate counsel's performance are also forfeited. Defendant did not raise ineffective assistance of appellate counsel in his initial postconviction petition. At the time of his initial petition, he had all the available information necessary to raise this argument and failed to do so. No explanation was provided for failing to raise this issue in the initial postconviction petition. Defendant has failed to establish the "cause" prong of the "cause and prejudice" test and has forfeited this issue on appeal from his successive postconviction petition.

¶ 32 The trial court found this claim also alleged, in part, actual innocence. Defendant did not present any new evidence to suggest appellate counsel was ineffective. This claim is also without merit.

¶ 33 E. Eavesdropping Statute

¶ 34 Defendant argues an unrelated prior conviction was inappropriately considered as *modus operandi* evidence in the current case. We disagree. He relies on *People v. Melongo*, 2014 IL 114852, 6 N.E.3d 120, to argue his prior conviction, based on eavesdropping evidence (DeWitt County Case No. 04-CF-80), was unconstitutional because *Melongo* found the applicable eavesdropping statute unconstitutional. *Melongo*, 2014 IL 114852, ¶ 35, 6 N.E.3d 120. We agree with OSAD this claim can arguably establish the "cause" prong of the "cause and prejudice" test because *Melongo* was decided after defendant's appeal and petition and was

previously unavailable as an argument.

¶ 35 However, defendant cannot show prejudice. *Melongo* dealt with surreptitious recording by a defendant, not law enforcement. *Id*. ¶ 23. Court-sanctioned recording by police, under the eavesdropping statute, was allowed (720 ILCS 5/14-2 (a)(1)(B) (West 2004); 725 ILCS 5/108A-1 (West 2004)). In defendant's prior case, the eavesdropping was done pursuant to a court order allowing police officers to eavesdrop on defendant. The consideration of legitimately gathered evidence as *modus operandi* evidence is not prejudicial, let alone so prejudicial it infects the fairness of the entire trial. This argument is without merit.

¶ 36 F. Denial of Writ of *Mandamus*

¶ 37 Defendant argues the trial court erred by denying his "petition for *mandamus*." We disagree. *Mandamus* is an extraordinary remedy applied when no discretion is required in carrying out official acts. *People ex rel. Birkett v. Jorgensen*, 216 Ill. 2d 358, 362, 837 N.E.2d 72 (2005). A trial court can dismiss a postconviction petition at the first stage if it is frivolous and patently without merit. *Gaultney*, 174 Ill. 2d at 418, 675 N.E.2d at 106 (1996). The first step in a postconviction proceeding requires a *discretionary* determination, where a court must decide whether any claims are meritorious. The trial court correctly concluded *mandamus* was improper for this purpose. This claim was without merit.

¶ 38 III. CONLCUSION

¶ 39 We find any potential basis for OSAD to appeal would be frivolous and without merit. We grant its motion to withdraw as counsel on appeal and affirm the trial court's judgment.

¶ 40 Affirmed.