2017 IL App (1st) 142719-U

SIXTH DIVISION
Order filed: February 3, 2017

No. 1-14-2719

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 05 CR 22134
	)	
THOMAS GILBERT,	)	Honorable
	)	Timothy J. Chambers,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Cunningham and Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's dismissal of the petitioner's post-conviction petition at the second stage is affirmed where he failed to make a substantial showing of prejudice from trial counsel's alleged ineffective assistance in litigating his *Franks* motion.

¶ 2 Pursuant to a negotiated guilty plea, the petitioner, Thomas Gilbert, was convicted of possession of 15 grams or more, but less than 100 grams, of cocaine with intent to deliver and sentenced to seven years' imprisonment. He appeals from the circuit court's order dismissing his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West

2014)). On appeal, he contends that the court erred in dismissing his petition at the second stage of the proceedings where he made a substantial showing that trial counsel was ineffective in litigating his motion for an evidentiary hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). For the reasons that follow, we affirm.

¶ 3 On August 30, 2005, a warrant was issued to search the petitioner and his home located at 3831 North Fremont, apartment 312, in Chicago, and to seize "[c]rack [c]ocaine" and drug paraphernalia at that location. The warrant was issued based upon an affidavit signed and sworn to before the issuing judge by Chicago Police Officer David Rodriguez.

¶ 4 In the affidavit, Officer Rodriguez averred that on August 29, 2005, he observed the petitioner standing outside 3831 North Fremont and conducted a field interview with him in response to "numerous calls" regarding drug activity at that location; the petitioner indicated that he lived in apartment 312. Officer Rodriguez further attested that, on August 30, 2005, a confidential informant told him that, earlier that day, he purchased "2 plastic bags containing a white rock like substance" from the petitioner in apartment 312, and that he had bought crack cocaine from the petitioner at least six times during the previous three months. According to the informant, the petitioner had more bags containing the same substance and told him to "return for more anytime." Officer Rodriguez stated that he went to 3831 North Fremont with the informant, who confirmed that it was the location of the drug transaction and identified the petitioner in a photograph. Officer Rodriguez averred that the informant had provided him with information regarding narcotics activity on at least eight prior occasions and that each tip led to an arrest and the recovery of drugs.

¶ 5 On the evening of August 30, 2005, officers executed the search warrant at apartment 312 and recovered 18 plastic bags containing a substance resembling cocaine and three plastic bags

containing a substance resembling cannabis. The officers also inventoried two digital scales; a "bundle" of currency totaling $5,811; a letter addressed to the petitioner; and a copy of the petitioner's lease for the apartment. The petitioner was arrested and charged with possession of 15 grams or more, but less than 100 grams, of cocaine with intent to deliver.

¶ 6 On June 12, 2006, the petitioner's trial counsel filed a motion to quash the warrant and suppress evidence pursuant to *Franks*, alleging that, in the warrant affidavit, Officer Rodriguez fabricated his claim that an informant had purchased drugs from the petitioner on the day of the search. In support of the motion, the petitioner submitted his affidavit and the affidavit of his employer, Ricardo Arnold.

¶ 7 The petitioner, in his affidavit, denied selling drugs and claimed that he was not home from 7:30 a.m. to 8:30 p.m. on August 30, 2005. He stated that he first encountered Officer Rodriguez earlier that month, when the officer stopped him on the street, searched him, and asked for his address. Additionally, the petitioner averred that Officer Rodriguez sent an undercover detective to his apartment on August 28, 2005. That evening, he called the Office of Professional Standards (OPS) and lodged a complaint against Officer Rodriguez. Arnold, in his affidavit, attested that he was with the petitioner from 8:15 a.m. to 3 p.m. on August 30, 2005.

¶ 8 In addition to the *Franks* motion, trial counsel filed a motion to compel the State to reveal the informant's identity. The trial court, in response, ordered the State to produce logs, reports, affidavits, and search warrants from other cases involving the informant. The court reviewed these records *in camera* and denied both of the petitioner's motions. The court observed that the State provided "voluminous" material regarding "the investigation that led to the search warrant," including "handwritten notes regarding what transpired prior to the search warrant being

prepared and authorized[.]" These records, according to the court, defeated the petitioner's allegation that no informant existed and no drug transaction occurred.

¶ 9 The petitioner subsequently requested a plea conference pursuant to Illinois Supreme Court Rule 402(d) (eff. July 1, 1997). Following the conference, he entered a negotiated plea of guilty to possession of 15 grams or more, but less than 100 grams, of cocaine with intent to deliver in exchange for a sentence of seven years' imprisonment. The trial court delivered the requisite admonishments and waivers, heard the factual basis for the plea, accepted the defendant's guilty plea, and imposed a seven-year sentence.

¶ 10 On direct appeal, the petitioner alleged that the trial court provided insufficient admonishments pursuant to Illinois Supreme Court Rule 605(c) (eff. Oct. 1, 2001). This court affirmed, as the petitioner did not file a motion to vacate his guilty plea as required by Illinois Supreme Court Rule 604(d) (eff. July 1, 2006). *People v. Gilbert*, No. 1-07-0595 (Aug. 26, 2008) (unpublished order under Supreme Court Rule 23).

¶ 11 On July 20, 2007, the petitioner filed a *pro se* post-conviction petition in which he alleged, in relevant part, that he would not have pled guilty but for trial counsel's failure to properly litigate his *Franks* motion. The petition advanced to the second stage of the proceedings and, the petitioner received appointed counsel. Subsequently, he elected to proceed *pro se* and filed an amended petition on June 6, 2014. A copy of a letter to the petitioner from OPS, acknowledging that he had lodged a complaint on August 28, 2005, was attached to both the original petition and the amended petition.[1]

[1] The original petition, but not the amended petition, also included copies of letters that the petitioner claimed to have sent to trial counsel requesting that he submit the OPS letter with the *Franks* motion.

¶ 12 On August 8, 2014, the circuit court granted the State's amended motion to dismiss the post-conviction petition. The court stated:

> "*** The issue of the informant was dealt with by [the trial court, which] held what is called a Franks hearing. Franks hearings are always done in camera, that way [the judge] looks at it himself without anyone else. And after looking at the record, he was satisfied that an informant existed.
>
> So on those grounds, the post-conviction petition certainly cannot stand."

¶ 13 On appeal, the petitioner contends that his post-conviction petition made a substantial showing that his trial counsel was ineffective for failing to present the OPS letter in support of his *Franks* motion. The letter, according to the petitioner, confirmed that he filed a complaint against Officer Rodriguez shortly before the officer requested the search warrant and established his motive to lie regarding the existence of a confidential informant. Had counsel presented the letter, the petitioner submits that the trial court would have had reason to doubt Officer Rodriguez's credibility and, therefore, would have ordered an evidentiary *Franks* hearing where the officer could be called and examined. The petitioner argues that the hearing would have "expose[d] the false statements upon which the [search] warrant was based," and, as a result, the court would have quashed the search warrant and he would not have pled guilty. Therefore, the petitioner maintains that he also made a substantial showing that counsel's performance caused prejudice and violated his constitutional rights.

¶ 14 The Act provides a three-stage process for a defendant to collaterally attack his conviction based on substantial violations of his constitutional rights. 725 ILCS 5/122-1 *et seq.* (West 2014); *People v. English*, 2013 IL 112890, ¶¶ 22-23. If the defendant's initial *pro se* petition withstands the first stage by raising "the gist of a meritorious claim," the petition

advances to the second stage of review. 725 ILCS 5/122-2.1(b) (West 2014); *People v. Greer*, 212 Ill. 2d 192, 204 (2004). At the second stage, the State may respond to the petition or file a motion to dismiss. 725 ILCS 5/122-5 (West 2014); *People v. Domagala*, 2013 IL 113688, ¶ 33. A motion to dismiss "assumes the truth of the allegations to which it is directed and questions only their legal sufficiency." *People v. Miller*, 203 Ill. 2d 433, 437 (2002).

¶ 15 During second-stage proceedings, "the petitioner bears the burden of making a substantial showing of a constitutional violation." *Domagala*, 2013 IL 113688, ¶ 35. In order to meet this burden, the petitioner must demonstrate that his "well-pled allegations of a constitutional violation, *** *if proven* at an evidentiary hearing, would entitle petitioner to relief." (Emphasis in original.) *Id.* The court takes as true all well-pled factual allegations which are not "affirmatively refuted by the record," but does not resolve evidentiary questions, engage in fact-finding, or make credibility determinations at this stage. *Id.* ¶¶ 34-35. Where "the petition and any accompanying documentation make a substantial showing of a constitutional violation[,]" the defendant is entitled to a third-stage evidentiary hearing. *People v. Cotto*, 2016 IL 119006, ¶ 28. We review the dismissal of a second-stage post-conviction petition *de novo*. *People v. Sanders*, 2016 IL 118123, ¶ 31.

¶ 16 In this case, the petitioner entered a negotiated plea of guilty, which generally "waives all non-jurisdictional errors or irregularities," including constitutional errors. *People v. Townsell*, 209 Ill. 2d 543, 545 (2004); see also *Tollet v. Henderson*, 411 U.S. 258, 267 (1973) ("a guilty plea represents a break in the chain of events which has preceded it in the criminal process"). Consequently, a defendant who has pled guilty "may only attack the voluntary and intelligent character of the guilty plea" by demonstrating that counsel's ineffective assistance rendered the plea involuntary. *Id.* (citing *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970)).

¶ 17 To demonstrate a claim of ineffective assistance at the second stage of postconviction proceedings, a defendant must make a substantial showing that (1) counsel's performance fell below an objective standard of reasonableness, and (2) there exists a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v. Tate*, 2012 IL 112214, ¶ 19 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). "A defendant's failure to establish either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel." *People v. Henderson*, 2013 IL 114040, ¶ 11.

¶ 18 The petitioner alleges that he would not have pled guilty but for trial counsel's alleged ineffective assistance in connection to his *Franks* motion. Pursuant to *Franks*, a defendant is entitled to an evidentiary hearing to attack the veracity of statements made in an application for a search warrant when he makes a substantial preliminary showing that (1) the affiant included a false statement in the warrant affidavit knowingly and intentionally or with a reckless disregard for the truth, and (2) the allegedly false statement was necessary to the finding of probable cause. *People v. Chambers*, 2016 IL 117911, ¶ 35 (citing *Franks*, 438 U.S. at 155-56). The defendant's burden in order to make a preliminary showing " 'lies somewhere between mere denials on the one hand and proof by a preponderance on the other.' " *Id.* ¶ 41 (quoting *People v. Lucente*, 116 Ill. 2d 133, 152 (1987)). The petitioner's allegations, however, "must be more than conclusory" and "must be accompanied by an offer of proof." *Franks*, 438 U.S. at 171.

¶ 19 Even if this court were to find that trial counsel was deficient for not submitting the OPS letter with the *Franks* motion, the petitioner has not made a substantial showing that he incurred prejudice. More specifically, he has not demonstrated that, but for counsel's omission of the letter, the trial court would have quashed the search warrant and he would not have pled guilty.

¶ 20 The OPS letter, at most, corroborates the petitioner's claim in his *Franks* affidavit that he lodged a complaint against Officer Rodriguez two days before the officer obtained the search warrant. Taking this allegation as true, as we must at the second stage of post-conviction proceedings (*Sanders*, 2016 IL 118123, ¶ 31), the letter demonstrates not that Officer Rodriguez testified falsely in obtaining the search warrant, but rather, that a motive for the officer to falsely testify may have existed. Thus, even if the letter had been presented to the trial court, the petitioner's theory that Officer Rodriguez fabricated information attributed to the informant in his warrant affidavit would still be conclusory and, therefore, insufficient to require an evidentiary *Franks* hearing. See *Franks*, 438 U.S. at 171 (the "challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine"); see also *People v. Coleman*, 183 Ill. 2d 366, 381 (1998) (noting that "[n]onfactual and nonspecific assertions which merely amount to conclusions" do not require an evidentiary hearing under the Act).

¶ 21 To the extent the petitioner argues that, due to the omission of the OPS letter, the trial court "had no reason to question the credibility of Officer Rodriguez[,]" we observe that the petitioner's *Franks* motion included alibi affidavits that purported to contradict the warrant affidavit and alleged that previous encounters occurred between the petitioner and the officer. After receiving the affidavits, the court reviewed "voluminous" material regarding "what transpired prior to the search warrant being prepared and authorized[.]" Thus, contrary to the petitioner's assertion, the court had reason to examine Officer Rodriguez's credibility in view of both the affidavits and the additional materials, and, only afterwards, rejected the allegation that no informant existed and no drug transaction occurred. With the court thus apprised, we cannot say that it would have rejected the warrant affidavit and quashed the search warrant but for

counsel's failure to present the OPS letter. See *Lucente*, 116 Ill. 2d at 152 (1987) (noting that the trial court is charged with "balancing *** the statements in the warrant affidavit versus those in support of the defendant's challenge to the warrant").

¶ 22 As the petitioner has not demonstrated that, but for counsel's failure to present the OPS letter with his *Franks* motion, the trial court would have quashed the search warrant and he would not have pled guilty, his claim for ineffective assistance fails. *Henderson*, 2013 IL 114040, ¶ 11. Consequently, he has not made a substantial showing of a constitutional violation and the circuit court properly dismissed his post-conviction petition at the second stage of proceedings. *Domagala*, 2013 IL 113688, ¶ 35.

¶ 23 For the foregoing reasons, we affirm the judgment of the circuit court dismissing the petitioner's post-conviction petition.

¶ 24 Affirmed.