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2017 IL App (3d) 150656-U

Order filed November 7, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 21st Judicial Circuit,
	)	Kankakee County, Illinois.
Plaintiff-Appellee,	)	
	)	Appeal No. 3-15-0656
v.	)	Circuit No. 11-CF-64
	)	
TERRANCE D. CLAYPOOL,	)	
	)	Honorable Clark E. Erickson,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Carter and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err in summarily dismissing defendant's *pro se* postconviction petition.

¶ 2 Defendant, Terrance D. Claypool, appeals the first-stage dismissal of his postconviction petition, arguing that appellate counsel was ineffective in failing to challenge the sufficiency of the evidence on direct appeal. We affirm.

¶ 3 FACTS

¶ 4 In 2011, the State charged defendant with possession of a controlled substance with intent to deliver. 720 ILCS 570/401(c)(2) (West 2010). The case proceeded to a jury trial. Officer Christopher Benoit testified that he had been a police officer for the Kankakee police department for a little less than four years. On January 30, 2011, he was out on patrol a little before 1 a.m. He saw defendant and thought defendant looked like he was locked out of his vehicle. Benoit drove closer to defendant to offer to help him. Defendant walked through an alleyway. When he saw Benoit, defendant took a sharp turn. Benoit then pulled up near him, opened his window, and yelled to defendant "hey, hold on a second." Defendant fell to the ground, and Benoit jogged over to defendant. Benoit escorted defendant back to the police car because he "was developing the conclusion that [defendant] had possibly been trying to tamper with that vehicle or burglarize it." Benoit told defendant to place both his hands on the vehicle because he was going to pat him down. Defendant struggled and pulled away. Benoit jumped on defendant's back, and defendant drug Benoit about 20 or 25 feet down the street. Benoit used his radio on his shoulder to inform dispatch that he was in a struggle with a subject. Defendant got away and ran down the street.

¶ 5 While he was running, Benoit noticed that defendant had a "small whitish object in his left hand." Defendant brought his left hand up to his face. After he did so, Benoit did not see the white object in defendant's hand. Benoit assumed defendant had put it in his mouth. Benoit eventually caught up with defendant and pushed him to the ground. Defendant then crawled on the ground to a drainage grate, spit the white object onto the edge of the grate, and then pushed the object into the grate. Benoit looked into the grate and saw "four clear plastic baggies containing a whitish substance that appears to be rock cocaine." Agent Kristopher Lombardi was dispatched to the scene, seized the packages from the grate using "mechanical fingers," and gave them to Benoit to enter into evidence.

¶ 6 Benoit arrested defendant and patted him down. He did not find any drug paraphernalia. He then took defendant to the jail. Once at the jail, Benoit noticed that "there was a whitish milky substance that was coming from the corners of [defendant's] mouth," which he believed to be cocaine that had "come out with his drool." Benoit swabbed defendant's face with gauze and placed the gauze into evidence.

¶ 7 David VanWingeren testified that he was a forensic drug chemist for the Illinois State Police at the Joliet laboratory. He received the four bags of the white substance, which "appeared to be wet and chewed up." He weighed and tested the substance and determined that it was 7.8 grams of cocaine. He also tested the gauze Benoit had used to wipe the saliva around defendant's mouth and it tested positive for cocaine.

¶ 8 Lieutenant Christopher Kidwell testified that he was the Deputy Director of the Kankakee Area Metropolitan Enforcement Group (KAMEG). He had been with the KAMEG for 12 or 13 years and had been a police officer for a total of 22 years. He said the KAMEG was a multi-jurisdictional drug enforcement task force. Kidwell stated that every year he attends training on tactics and narcotics and also attends the Illinois Drug Enforcement Officers Association conference. He had arrested hundreds of people engaged in illegal narcotics activity and executed over 1000 search warrants for narcotics. He had spoken with narcotics users about the use, sale, method of making, and packaging of cocaine hundreds of times. The circuit court accepted Kidwell as an expert in the area of cocaine use and delivery.

¶ 9 Kidwell stated that crack cocaine is usually ingested by smoking. "A user usually purchases a tenth or a half a gram at a time." He stated that a tenth of a gram usually sells for $10 and a half a gram sells for $50. Kidwell said $100 worth of crack cocaine a day would be "pretty significant for a crack addict." The State showed Kidwell the 7.8 grams of cocaine they found in

the grate. Kidwell stated that a drug dealer would buy that much cocaine wholesale for about $300 to $400, but it would sell for about $700 to $800. Kidwell was not aware of any narcotic users who possessed that much cocaine and stated that it was not consistent with personal use. In the more than 500 narcotics users he had encountered during his career, he had never encountered a narcotics user with almost eight grams of crack cocaine. The fact that no drug paraphernalia was found would be considered inconsistent for a cocaine user, as "[a] crack user usually will have some way to ingest it in his system." Kidwell stated that it is not necessary for a cocaine dealer to have cash on him, stating, "if he had just purchased the crack cocaine, he may not have the currency on him. Generally, if they just sell it and you catch them in transition, you'll find the money. But it just depends where they're at in the transition of their sale." The State asked Kidwell, "Based upon your prior testimony and your experience, do you have an opinion as to whether the crack cocaine recovered from the drainage grate in this case would be indicative of cocaine offered for sale or cocaine possessed for personal use?" Kidwell stated, "For sale."

¶ 10 Defendant did not offer any evidence. The jury found defendant guilty of possession of a controlled substance with intent to deliver. The court sentenced defendant to 15 years' imprisonment with 3 years' mandatory supervised release.

¶ 11 On direct appeal, defendant, through appellate counsel, solely argued that the court erred in denying defendant's pretrial motion to suppress. *People v. Claypool*, 2014 IL App (3d) 120468, ¶ 13. We affirmed. *Id.* ¶ 25. The Illinois Supreme Court denied defendant's petition for leave to appeal in January 2015. *People v. Claypool*, No. 118531 (Ill. Jan. 28, 2015).

¶ 12 In June 2015, defendant filed a *pro se* postconviction petition, which is the subject of this appeal. In his petition, defendant argued that appellate counsel was ineffective for failing to raise

a challenge to the sufficiency of the evidence. Specifically, defendant stated that appellate counsel should have argued that defendant lacked the intent to deliver. The court dismissed the petition at the first stage, finding the claim meritless. In doing so, the court noted that an expert testified that 7.8 grams of cocaine was inconsistent with personal use.

¶ 13 ANALYSIS

¶ 14 On appeal, defendant argues that the court erred in summarily dismissing defendant's *pro se* postconviction claim of ineffective assistance of appellate counsel. Upon review, we find that it was not objectively unreasonable for appellate counsel to fail to challenge the sufficiency of the evidence.

¶ 15 Claims of ineffective assistance of appellate counsel are evaluated under the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). "[A postconviction] petition alleging ineffective assistance may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *People v. Hodges*, 234 Ill. 2d 1, 17 (2009). "[C]ounsel on appeal has no obligation to raise every conceivable argument which might be made, and counsel's assessment of what to raise and argue will not be questioned unless it can be said that his judgment in this regard was patently erroneous." *People v. Collins*, 153 Ill. 2d 130, 140 (1992). The court may summarily dismiss a petition at the first stage of postconviction proceedings as frivolous or patently without merit where it has no arguable basis in law or fact. *Hodges*, 234 Ill. 2d at 16.

¶ 16 To determine whether it is arguable that appellate counsel's failure to challenge the sufficiency of the evidence amounts to ineffective assistance, we must address the potential merits of the underlying sufficiency of the evidence claim. See *People v. Moore*, 177 Ill. 2d 421,

428 (1997); *People v. Easley*, 192 Ill. 2d 307, 329 (2000) (counsel is not deficient for failing to raise a meritless issue). "A criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *People v. Collins*, 106 Ill. 2d 237, 261 (1985). It is within the province of the jury to determine the credibility of the witnesses and the weight to give their testimony. *Id.* at 261-62. It is not the function of the reviewing court to retry the defendant. *Id.* at 261. " '[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis omitted.) *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

¶ 17 In order to prove defendant guilty beyond a reasonable doubt of possession of a controlled substance with intent to deliver under section 401(c)(2) of the Illinois Controlled Substances Act, the State had to prove (1) defendant knowing possessed a controlled substance, (2) the amount of the controlled substance was more than one gram and less than 15 grams, and (3) defendant intended to deliver the controlled substance. 720 ILCS 570/401(c)(2) (West 2010). Defendant solely argues that the evidence was not sufficient to prove he intended to deliver the controlled substance. Stated another way, defendant does not deny that the evidence was sufficient to establish that he possessed the requisite amount of cocaine.

¶ 18 "The question of whether the evidence is sufficient to prove intent to deliver must be determined on a case-by-case basis." *People v. Robinson*, 167 Ill. 2d 397, 412-13 (1995). "Intent to deliver is often proved by circumstantial evidence." *People v. Beverly*, 278 Ill. App. 3d 794, 799 (1996). Many different factors have been considered by courts as probative of intent to deliver, including, but not limited to, (1) "whether the quantity of controlled substance in defendant's possession is too large to be viewed as being for personal consumption," (2) "the

high purity of the drug confiscated," (3) "the possession of weapons," (4) the possession of large amounts of cash," (5) "the possession of police scanners, beepers or cellular telephones," (6) "the possession of drug paraphernalia," and (7) "the manner in which the substance is packaged." *Robinson*, 167 Ill. 2d at 408. "[T]he quantity of controlled substance alone can be sufficient evidence to prove an intent to deliver beyond a reasonable doubt. However, such is the case only where the amount of controlled substance could not reasonably be viewed as designed for personal consumption." *Id.* at 410-11.

¶ 19 Here, 7.8 grams of cocaine was found in defendant's possession. The State tendered an expert in the field of narcotics use and delivery who testified that, based on his experience, 7.8 grams of cocaine was not consistent with personal use. In his hundreds of drug cases, he had never encountered a person who had that much cocaine for personal use. He further testified that the lack of drug paraphernalia was also consistent with cocaine delivery as opposed to use. Defendant did not present any evidence to refute this expert testimony. The expert's testimony was enough to prove that the amount of the cocaine "could not reasonably be viewed as designed for personal consumption." See *id.* at 411. Consequently, an appellate challenge to the sufficiency of the evidence would have failed on its merits. It, therefore, cannot be argued that the absence of an appellate challenge to the sufficiency of the evidence constitutes ineffective assistance of appellate counsel. See *Hodges*, 234 Ill. 2d at 16-17 (a court may summarily dismiss a petition alleging ineffective assistance of counsel if the claim has no arguable basis in law or fact).

¶ 20 In coming to this conclusion, we reject defendant's cited authority alleging that the State needed to present more circumstantial evidence of intent to deliver. None of the cases defendant relies on involved unrefuted expert testimony that the quantity of the drugs was inconsistent with

personal use. See, *e.g.*, *People v. Nixon*, 278 Ill. App. 3d 453 (1996); *People v. Ellison*, 2013 IL App (1st) 101261. In fact, two of the cases specifically note that the State did not present an expert to testify that the amount of drugs could not be reasonably viewed as designed for personal consumption. See *Robinson*, 167 Ill. 2d at 413 ("there is no evidence in the record, such as expert testimony, that the amount of cocaine and PCP in the defendant's possession was more than would reasonably be used for personal consumption."); *People v. Rivera*, 293 Ill. App. 3d 574, 578 (1997) ("The State offered no expert testimony in the present case that the amount of cocaine possessed by defendant was inconsistent with personal consumption.").

¶ 21 CONCLUSION

¶ 22 For the foregoing reasons, we affirm the judgment of the circuit court of Kankakee County.

¶ 23 Affirmed.