

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).

2017 IL App (4th) 140945-U
NO. 4-14-0945

FILED
May 17, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
LEONEL GALAVIZ-GALAVIZ,)	No. 10CF1665
Defendant-Appellant.)	
)	Honorable
)	Heidi N. Ladd,
)	Judge Presiding.

PRESIDING JUSTICE TURNER delivered the judgment of the court.
Justices Appleton and Pope concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court granted appellate counsel’s motion to withdraw and affirmed the trial court’s judgment.

¶ 2 Following a stipulated bench trial in June 2011, the trial court found defendant, Leonel Galaviz-Galaviz, guilty of unlawful possession with intent to deliver methamphetamine. In July 2011, the court sentenced him to 25 years in prison. This court affirmed defendant’s conviction and sentence. In July 2013, defendant filed a *pro se* postconviction petition, and appointed counsel filed an amended petition in December 2013. Following an evidentiary hearing, the trial court denied defendant’s amended petition.

¶ 3 On appeal, the office of the State Appellate Defender (OSAD) moves to withdraw its representation of defendant, citing *Pennsylvania v. Finley*, 481 U.S. 551 (1987), contending an appeal in this cause would be without merit. We grant OSAD’s motion and affirm the trial

court's judgment.

¶ 4

I. BACKGROUND

¶ 5 In September 2010, the State charged defendant by information with one count of unlawful possession with intent to deliver methamphetamine, a Class X felony, in that he knowingly and unlawfully possessed with the intent to deliver 900 grams of a substance containing methamphetamine (720 ILCS 646/55(a)(1), (2)(F) (West 2010)). In October 2010, Harvey Welch entered his appearance as defendant's attorney. Welch also represented a codefendant, Jose Canizalez-Cardena (hereinafter, Cardena), who was similarly charged. Both defendant and Cardena required an interpreter as they spoke little or no English.

¶ 6 In November 2010, defendant filed a motion to suppress evidence, arguing evidence seized by police officers following a traffic stop was the result of an unlawful search. In December 2010, the trial court conducted a hearing on the motion.

¶ 7 Illinois State Police trooper Chris Owen testified he was on duty on September 29, 2010, at approximately 5 p.m., when he observed a silver Toyota Camry traveling in excess of the speed limit on Interstate 57 near Rantoul. After noticing the car make an abrupt lane change and follow another car too closely, Owen initiated a traffic stop. Defendant was driving, and Cardena was the only passenger. Defendant provided a Mexican driver's license. Defendant's hands trembled and his carotid artery pulsed, and his heart could be seen pounding. Cardena also provided a Mexican license with trembling hands. His carotid artery pulsed and he stared straight ahead. Owen stated it is not unusual for people to be nervous, but defendant was overly so, and Cardena was equally nervous. Owen could smell air fresheners and saw several in the car, which in his experience indicated the possibility of the presence of drugs.

¶ 8 Defendant responded to questions "for the most part" in English. He said he

came from Los Angeles. He said he was traveling to Illinois but could not say where, but he was there for construction and demolition work as there was no work in Los Angeles. The insurance for the car was recently purchased in defendant's name, but the car did not belong to him. As Owen's suspicions grew, he went to talk to Cardena in the passenger seat while continuing to fill out the warning tickets. He asked Cardena in Spanish "where" and "work," but he received no response. Owen found Cardena to be "exhibiting numerous non-verbal indicators of excessive nervousness and stress," and he asked Cardena in Spanish to exit the vehicle and stand in the ditch. There was a phone in Cardena's pocket that rang constantly.

¶ 9 Approximately seven minutes into the stop, Owen opened the rear of his car to release Xocko, his dog trained to detect marijuana, cocaine, methamphetamine, and heroin. As Xocko began to move around the car, Cardena turned his body and appeared to be praying. At the front driver's side door, Xocko indicated by his body language that he detected the odor of narcotics. Xocko then jumped into the car through the open window and alerted to an area in the rear seat cushion. Owen called for backup. He requested and received verbal and written consent in Spanish from defendant to search the car's interior. Owen found a hidden compartment between the rear tires, directly below the front of the trunk. He said that Toyota Camrys commonly have this compartment. He drilled a hole and used a fiber-optic scope to see bundles of green cellophane. The car was towed to Illinois State Police headquarters. There, Owen found the access plate inside the driver's side rear wheel well. The compartment contained 2,236.1 grams of methamphetamine.

¶ 10 In January 2011, the trial court denied the motion to suppress evidence. In March 2011, the State filed a motion for joinder of the cases involving defendant and Cardena. Defense counsel had no objection to the motion to consolidate. The court asked counsel if he

had any concerns about antagonistic or inconsistent defenses that could cause prejudice to either defendant, and counsel responded in the negative. The court granted the motion.

¶ 11 In May 2011, defendant and Cardena waived their rights to a jury trial and proceeded to a stipulated bench trial. The parties stipulated Owen would testify consistently with testimony he provided at the suppression hearing. He would be qualified as an expert in narcotics trafficking and interdiction, would testify that 2,236.1 grams of methamphetamine is a quantity indicative of an intent to deliver, and would also testify that the presence of multiple cell phones constituted further evidence of drug sales. He would testify the street value of the drugs was \$628,764.

¶ 12 The parties stipulated to defendant's postarrest statements. He stated he could not find a job in Los Angeles and a friend, Jose Valle, offered him \$4,000 to drive a car from Los Angeles to Chicago and to deliver the car to a man unknown to defendant. Defendant believed the car belonged to Valle's brother, Francisco. Defendant never communicated with the recipient of the car, known to him only as "the Cuban." When defendant and Cardena arrived at the location, they waited three hours. Jose Valle then called to tell them the Cuban was there. They followed the Cuban for about 1 1/2 hours. Owen believed defendant's story to be implausible as defendant was off-route from where he said he was going and could not specify where in Illinois he was coming from. Defendant and Cardena had known each other for about six months, having met when working construction. Defendant stated he and Cardena shared the driving duties as they drove across the country. Defendant did not know Cardena, Jose Valle, or Francisco Valle to be involved in drug trafficking and did not know methamphetamine was in the car.

¶ 13 Further investigation revealed Cardena was actually Bernabe Galaviz-German,

and he had previously been deported. Registered letters to the owners of the Toyota, sent to addresses in Utah, were returned unclaimed. The parties stipulated People's exhibit No. 1 was 2,236.1 grams of methamphetamine.

¶ 14 Defense counsel indicated he discussed the stipulations with his clients. He stated they understood the main issue centered on the search and agreed to proceed with the stipulated bench trial.

¶ 15 The trial court concluded it was not credible to believe the two defendants agreed to drive the car to Chicago in exchange for \$4,000 for defendant and "for the thrill of a ride" for Cardena. It was not credible that the two men would agree to meet an unidentified Cuban in Chicago, switch cars, and drive back.

"It is apparent they were acting as couriers and clearly knew they were transporting that car and then switching it out for drugs to come back to whatever place was going to be the delivery point. And in that context their reaction to the trooper and that extreme reaction of nervousness out of all proportion to the reason for the stop is understandable."

The court found both defendants guilty.

¶ 16 In July 2011, the trial court sentenced defendant to 25 years in prison. Cardena also received a 25-year sentence at a separate hearing. Defense counsel filed a motion to reconsider defendant's sentence, which the court denied in August 2011.

¶ 17 On direct appeal, defendant argued (1) the State's evidence was insufficient to convict; (2) the trial court erred in denying the motion to suppress evidence; and (3) the court considered improper factors in sentencing. This court affirmed defendant's conviction and

sentence. *People v. Galaviz-Galaviz*, 2012 IL App (4th) 110719-U.

¶ 18 In July 2013, defendant filed a *pro se* petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2012)), raising multiple claims with regard to Owen's testimony and the effectiveness of trial and appellate counsel. In October 2013, the trial court docketed the petition and appointed counsel.

¶ 19 In December 2013, counsel filed an amended petition advancing four claims, including (1) prosecutorial misconduct for failing to disclose investigative reports or electronic surveillance of cellular telephone intercepts from the Vermilion County Metropolitan Enforcement Group (VMEG); (2) ineffective assistance of trial counsel for failing to object to Owen's testimony about phone intercepts and VMEG investigative information; (3) ineffective assistance of trial counsel based on *per se* and actual conflicts of interest; and (4) ineffective assistance of appellate counsel for failing to raise these issues on direct appeal.

¶ 20 In February 2014, the State filed an answer to the amended petition. In April 2014, the trial court conducted an evidentiary hearing. Owen testified he had been informed by Master Sergeant Steve Guess of VMEG that a Toyota with Utah license plates "was potentially transporting methamphetamine" on the interstate in Champaign County. Owen pulled over the driver of the Toyota for speeding and following too closely. Owen acknowledged he did not include the VMEG tip in his report, but he did mention the phone call intercepts to the prosecutor prior to the suppression hearing. While searching the vehicle, Owen testified he received word from Guess regarding an intercepted call that said " 'don't worry, he won't find it,' or 'they won't find it.' "

¶ 21 Steve Guess testified VMEG had information about the trafficking of methamphetamine from Utah and California into the Midwest. VMEG also received information

from the Drug Enforcement Administration that a silver Toyota would be carrying methamphetamine on Interstate 57. Guess telephoned the tip to Owen. Guess was unaware of any surveillance on defendant or Cardena.

¶ 22 Harvey Welch testified he did not see a problem with representing both defendants because he believed the only viable strategy in the case was to suppress the drugs. Welch explained the strategy to defendant, who did not object to proceeding in that fashion. Welch did not object upon hearing of the VMEG tip because he was addressing the search, not the stop.

¶ 23 Sarah Carlson testified she prosecuted defendant's case. She stated she had no intention of calling either defendant as a witness because the evidence stood on its own. She was surprised about the VMEG tip when Owen testified about it.

¶ 24 Defendant testified he talked with Welch "a few times." He stated it was difficult to understand Welch's interpreter because he was mixing languages when speaking. Defendant stated Welch did not ask his permission to also represent Cardena or to consolidate the cases. Defendant stated he wanted to have a jury trial, but Welch pressured him to waiving the jury.

¶ 25 In October 2014, the trial court issued a written order. On the issue of prosecutorial misconduct and the claim of a discovery violation, the court noted there was no surveillance of defendant or Cardena, neither the call nor the tip were exculpatory, and neither the call nor the tip impeached Owen's testimony. On the conflict issue, the court found no *per se* conflict of interest because the State never intended to call Cardena as a witness. The court also found no actual conflict, as defendant did not identify any specific defect in tactics relating to the joint representation. After finding these claims without merit, the court found defendant's claim that appellate counsel was ineffective had no merit. The court then denied the petition. This

appeal followed.

¶ 26

II. ANALYSIS

¶ 27 On appeal, OSAD has filed a motion to withdraw as counsel and has included a supporting memorandum. Proof of service has been shown on defendant. This court granted defendant leave to file additional points and authorities on or before October 20, 2016.

Defendant filed a response, and the State filed a brief as well. Based on our examination of the record, we conclude, as has OSAD, that an appeal in this cause would be meritless.

¶ 28 The Act “provides a mechanism for criminal defendants to challenge their convictions or sentences based on a substantial violation of their rights under the federal or state constitutions.” *People v. Morris*, 236 Ill. 2d 345, 354, 925 N.E.2d 1069, 1075 (2010). A proceeding under the Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *People v. English*, 2013 IL 112890, ¶ 21, 987 N.E.2d 371. The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008).

“Because this is a collateral proceeding, rather than an appeal of the underlying judgment, a post-conviction proceeding allows inquiry only into constitutional issues that were not, and could not have been, adjudicated on direct appeal. [Citation.] Thus, issues that were raised and decided on direct appeal are barred from consideration by the doctrine of *res judicata*; issues that could have been raised, but were not, are considered waived.” *People v. Pitsonbarger*, 205 Ill. 2d 444, 455-56, 793 N.E.2d 609, 619 (2002).

¶ 29 The Act establishes a three-stage process for adjudicating a postconviction petition. *English*, 2013 IL 112890, ¶ 23, 987 N.E.2d 371. At the first stage, the trial court must review the postconviction petition and determine whether “the petition is frivolous or is patently without merit.” 725 ILCS 5/122-2.1(a)(2) (West 2012). If the petition is not dismissed at the first stage, it advances to the second stage. 725 ILCS 5/122-2.1(b) (West 2012).

¶ 30 At the second stage, the trial court may appoint counsel, who may amend the petition to ensure defendant’s contentions are adequately presented. *People v. Pendleton*, 223 Ill. 2d 458, 472, 861 N.E.2d 999, 1007 (2006). Also at the second stage, the State may file an answer or move to dismiss the petition. 725 ILCS 5/122-5 (West 2012). A petition may be dismissed at the second stage “only when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation.” *People v. Hall*, 217 Ill. 2d 324, 334, 841 N.E.2d 913, 920 (2005).

¶ 31 If “a substantial showing of a constitutional violation is established, the petition proceeds to the third stage for an evidentiary hearing.” *People v. Harris*, 224 Ill. 2d 115, 126, 862 N.E.2d 960, 967 (2007). In this case, the trial court denied postconviction relief following an evidentiary hearing. “Following an evidentiary hearing where fact-finding and credibility determinations are involved, the trial court’s decision will not be reversed unless it is manifestly erroneous.” *People v. Beaman*, 229 Ill. 2d 56, 72, 890 N.E.2d 500, 509 (2008).

¶ 32 In the case *sub judice*, OSAD argues no meritorious arguments can be made that the trial court’s denial of third-stage relief was manifestly erroneous or that postconviction counsel failed to comply with Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013). Our review of the record reveals OSAD’s argument is correct. The evidence presented at the evidentiary hearing did not establish a discovery violation or prosecutorial misconduct. Further,

the evidence did not establish trial counsel was operating under a *per se* or actual conflict of interest or providing ineffective assistance. No viable issue could be raised regarding counsel's Rule 651(c) certificate either. Instead, a review of the evidence leads to the conclusion that defendant's issues had no merit. Accordingly, we find no colorable claim can be made that the court erred in denying defendant's amended postconviction petition.

¶ 33

III. CONCLUSION

¶ 34 For the reasons stated, we grant OSAD's motion and affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 35 Affirmed.