2017 IL App (4th) 150267-U

NO. 4-15-0267

FILED
March 3, 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.	)	Adams County
BRYAN D. HILL,	)	No. 12CF252
Defendant-Appellant.	)	
	)	Honorable
	)	Robert K. Adrian,
	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: The appellate court affirmed, finding the trial court did not err in summarily dismissing defendant's postconviction petition.

¶ 2 In February 2013, a jury found defendant, Bryan D. Hill, guilty of three counts of unlawful delivery of cannabis and one count of unlawful delivery of a controlled substance. In April 2013, the trial court sentenced him to prison. This court affirmed defendant's convictions and sentences on direct appeal. In December 2014, defendant filed a *pro se* postconviction petition, which the trial court summarily dismissed in March 2015.

¶ 3 On appeal, defendant argues the trial court erred in summarily dismissing his postconviction petition. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In May 2012, a grand jury indicted defendant on three counts of unlawful delivery

of cannabis and one count of unlawful delivery of a controlled substance. Count I alleged defendant committed the offense of unlawful delivery of cannabis (720 ILCS 550/5(d) (West 2010)) on August 30, 2010, when he knowingly and unlawfully delivered to another more than 30 grams, but less than 500 grams, of cannabis within 1,000 feet of a school or church. Count II alleged defendant committed the offense of unlawful delivery of a controlled substance (720 ILCS 570/401(d) (West 2010)) on September 1, 2010, when he knowingly delivered to another less than one gram of a substance containing cocaine. Count III alleged defendant committed the offense of unlawful delivery of cannabis (720 ILCS 550/5(b) (West 2010)) on September 1, 2010, when he knowingly and unlawfully delivered to another more than 2.5 grams, but not more than 10 grams, of a substance containing cannabis. Count IV alleged defendant committed the offense of unlawful delivery of cannabis (720 ILCS 550/5(d) (West 2010)) on September 7, 2010, when he knowingly and unlawfully delivered to another more than 30 grams, but not more than 500 grams, of a substance containing cannabis. Defendant pleaded not guilty.

¶ 6 In February 2013, defendant's jury trial commenced. Quincy police officer James Brown testified Terry Newman was the focus of an investigation for selling cannabis and prescription drugs in early 2010. Brown approached Newman and asked if he would be interested in cooperating with law enforcement "for consideration of his charges." Newman agreed to cooperate. Because of his cooperation, Newman ultimately was not charged for his offenses and received compensation for his work.

¶ 7 Newman told Brown he could purchase cannabis from defendant. On August 30, 2010, Brown prepared Newman for a drug buy with defendant. Because Newman did not have a valid driver's license, Newman's girlfriend, Kellie Willing, agreed to assist the task force by driving him to the drug transactions. Brown stated searches were conducted of both subjects and

the vehicle. He also provided prerecorded United States currency to Newman for use in the purchase of the cannabis as well as a covert video-recording device. He stated most of the drug buys utilized hidden video but not audio recording, as the latter involved a "somewhat time-consuming process" in receiving court authorization. Brown stated a review of the video of the transaction between Newman and defendant showed a transfer of money for a plastic bag of cannabis. After the transaction, Brown met with Newman and retrieved two plastic Baggies of suspected cannabis. Brown stated the transaction occurred within 1,000 feet of Quincy University.

¶ 8 Brown stated he engaged the services of Newman again on September 1, 2010. The proposed transaction was for a quarter pound of cannabis but ended up being "an ounce of higher grade cannabis," referred to as "kush." There was also an offer to buy a half gram of cocaine. Brown provided Newman with $160. Both Newman and Willing were searched prior to the transaction, as was the vehicle. Later, Brown met with Newman, who provided him with a plastic Baggie of cannabis and a small Baggie of suspected cocaine. A review of the hidden camera video showed Newman getting into defendant's car and engaging in a drug transaction with him.

¶ 9 On September 7, 2010, Brown provided Newman with $350 to purchase two ounces of cannabis and one gram of cocaine. Brown stated both Newman and Willing were searched. Brown followed the informants for a time but did not observe the alleged transaction. After the transaction took place, Newman met Brown and provided him with cannabis and $150. Brown stated the video recording device did not work during this transaction.

¶ 10 On cross-examination, Brown stated a search of a female informant is usually conducted by a female officer, if one is available. Brown stated he or an assisting officer

conducted the search of Willing. He also stated Newman assisted in the search by pulling her bra away from her body to make sure she was not concealing contraband. Brown testified he did not use a canine unit to help in searching the vehicle for contraband.

¶ 11 Kellie Willing testified Newman is the father of her son. She stated she agreed to provide transportation to Newman during the drug transactions. She stated neither she nor Newman hid drugs on their persons or in the vehicle during their time as confidential sources. She also stated she was searched prior to and after the transactions, as was the vehicle.

¶ 12 Illinois State Police Master Sergeant Robert Short testified he participated in the investigation on September 7, 2010, and met with Newman and Willing. Short noted he had warned Newman as to the repercussions of having any drugs in his possession. Short stated he did not find anything in his searches of the vehicle or of Newman. After the transaction, Brown recovered cannabis and currency from Newman. Short again searched Newman and the vehicle. He also observed Newman searching Willing, including pulling on her bra. Given the cannabis recovered on September 7, 2010, Short stated an object of that size would have been easily discovered during his searches.

¶ 13 Terry Newman testified he was serving a 10-year sentence for residential burglary. He had felony convictions for retail theft, obstructing justice, aggravated battery, and aggravated driving under the influence. In 2010, Newman was approached by Officer Brown following a delivery of cannabis and prescription pills and questioned about the possibility of becoming a confidential informant. In return for his cooperation, Newman hoped he would not be charged for the two felony offenses.

¶ 14 Prior to the transactions, Newman stated he and the vehicle were searched. He also participated in the search of Willing by grabbing her bra to "jiggle it a couple times" to

make sure there was no hidden contraband. During the first transaction, Newman carried a key-chain camera in his hand. He initially sought to buy two ounces of cannabis for $120 per ounce. Newman entered defendant's vehicle and purchased cannabis. Newman later provided the cannabis to Officer Brown, who searched him and the vehicle. Brown then gave him and Willing $60 each for their work.

¶ 15 Newman stated the second transaction took place in a vehicle in defendant's backyard. He purchased a half ounce of cannabis and a half gram of cocaine. After the transaction was complete, Newman gave the substances and remaining cash to Officer Brown, who searched him and the vehicle.

¶ 16 Newman stated the third transaction took place in front of defendant's house. Newman purchased cannabis from defendant for $150. Newman then turned over the marijuana and money to Officer Brown.

¶ 17 Defendant testified Newman contacted him on August 30, 2010, and stated he had some cannabis to sell. Defendant stated they met, and defendant purchased a half ounce of cannabis. Defendant stated they met again on September 1, 2010, and he purchased cannabis from Newman. Defendant remembered meeting Newman on September 7, 2010, but he did not get any cannabis from him on that day. Defendant testified he never sold any illegal substances to Newman.

¶ 18 Following closing arguments, the jury found defendant guilty on all four counts. In April 2013, defendant filed a posttrial motion, arguing the State's evidence failed to prove him guilty beyond a reasonable doubt. The trial court denied the motion. Thereafter, the court sentenced defendant to 12 years on count I, 10 years on count II, 5 years on count IV, and 364 days on count III. The court ordered all four sentences to run concurrently with one another.

¶ 19 On direct appeal, defendant argued (1) his convictions on counts II and IV required reversal because those convictions were based on the testimony of Newman, a confidential informant and drug user who assisted the police to make money and to avoid being charged with two drug offenses; and (2) his trial counsel was ineffective for failing to ask for the jury to be instructed to view the testimony of paid informants with caution. This court affirmed defendant's convictions and sentences. *People v. Hill*, 2014 IL App (4th) 130276-U.

¶ 20 In December 2014, defendant filed a *pro se* petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2014)). Therein, defendant alleged, *inter alia*, his attorney was ineffective for failing to (1) convey a three-year plea offer; (2) seek the dismissal of count III of the indictment for being filed beyond the statute of limitations for misdemeanors; and (3) impeach Newman about numerous charges that were allegedly dropped in exchange for his trial testimony. Along with portions of the trial transcript, defendant attached his own affidavits.

¶ 21 In March 2015, the trial court issued its written order on defendant's *pro se* petition, finding, in part, as follows:

> "Most of the issues raised by [defendant] could have been raised on direct appeal. Several of the issues including the issue of ineffective assistance of counsel were raised on appeal and found to be without merit. The other issues are without merit. The Court finds that the post-conviction petition is frivolous and patently without merit, and the petition is hereby dismissed."

This appeal followed.

¶ 22 II. ANALYSIS

¶ 23 Defendant argues the trial court erred in summarily dismissing his postconviction petition, claiming he raised the gist of a constitutional claim of ineffective assistance of counsel. We disagree.

¶ 24 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).

¶ 25 "The purpose of a post-conviction proceeding is to permit inquiry into constitutional issues involved in the original conviction and sentence that were not, nor could have been, adjudicated previously upon direct appeal." *People v. Peeples*, 205 Ill. 2d 480, 510, 793 N.E.2d 641, 660 (2002). In light of this, our supreme court has held "issues that could have been raised on direct appeal but were not are forfeited." *People v. Petrenko*, 237 Ill. 2d 490, 499, 931 N.E.2d 1198, 1204 (2010).

¶ 26 The Act establishes a three-stage process for adjudicating a postconviction petition. *English*, 2013 IL 112890, ¶ 23, 987 N.E.2d 371. Here, defendant's petition was dismissed at the first stage. 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 2014). Our supreme court has held "a *pro se* petition seeking postconviction relief under the Act for a denial of constitutional rights may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either

in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 11-12, 912 N.E.2d 1204, 1209 (2009). A petition lacks an arguable legal basis when it is based on an indisputably meritless legal theory, such as one that is completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16, 912 N.E.2d at 1212. A petition lacks an arguable factual basis when it is based on a fanciful factual allegation, such as one that is clearly baseless, fantastic, or delusional. *Hodges*, 234 Ill. 2d at 16-17, 912 N.E.2d at 1212.

¶ 27 Our supreme court has also noted a postconviction petition "need present only a limited amount of detail and is not required to include legal argument or citation to legal authority." *People v. Brown*, 236 Ill. 2d 175, 184, 923 N.E.2d 748, 754 (2010). Moreover, "[t]he allegations of the petition, taken as true and liberally construed, need only present the gist of a constitutional claim." *Brown*, 236 Ill. 2d at 184, 923 N.E.2d at 754.

¶ 28 "In considering a petition pursuant to [section 122-2.1 of the Act], the [trial] court may examine the court file of the proceeding in which the petitioner was convicted, any action taken by an appellate court in such proceeding[,] and any transcripts of such proceeding." 725 ILCS 5/122-2.1(c) (West 2014). The petition must be supported by "affidavits, records, or other evidence supporting its allegations," or, if not available, the petition must explain why. 725 ILCS 5/122-2 (West 2014). Our review of the first-stage dismissal of a postconviction petition is *de novo*. *People v. Dunlap*, 2011 IL App (4th) 100595, ¶ 20, 963 N.E.2d 394. Moreover, we may affirm the dismissal of a postconviction petition on any basis supported by the record. *People v. Wright*, 2013 IL App (4th) 110822, ¶ 32, 987 N.E.2d 1051.

¶ 29 A defendant's claim of ineffective assistance of counsel is analyzed under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Cathey*, 2012 IL 111746, ¶ 23, 965 N.E.2d 1109. "At the first stage of postconviction proceedings under

the Act, a 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." *Hodges*, 234 Ill. 2d at 17, 912 N.E.2d at 1212.

¶ 30 In his first argument on appeal, defendant contends he successfully raised a claim of ineffective assistance of counsel by alleging his attorney failed to seek the dismissal of count III, a misdemeanor, when that offense was not charged within the 18-month statute of limitations period and there was no basis for extending the limitations period.

¶ 31 Generally, the State must commence a prosecution for a misdemeanor offense within one year and six months after the offense was committed. 720 ILCS 5/3-5(b) (West 2014). The limitations period may be either tolled or extended for a variety of reasons. 720 ILCS 5/3-7 (West 2014). "Where an indictment on its face shows that an offense was not committed within the applicable limitation period, it becomes an element of the State's case to allege and prove the existence of facts which invoke an exception to the limitation period." *People v. Morris*, 135 Ill. 2d 540, 546, 554 N.E.2d 150, 153 (1990). Moreover, along with the elements of the charged offense, " '[t]he grounds upon which the People seek to wrest from a defendant the protection of section 3-5 of the Criminal Code *** should be stated in the information with sufficient specificity to enable him to defend against them.' " *Morris*, 135 Ill. 2d at 546, 554 N.E.2d at 153 (quoting *People v. Strait*, 72 Ill. 2d 503, 506, 381 N.E.2d 692, 693 (1978)).

¶ 32 In the case *sub judice*, the State alleged defendant committed the offense set forth in count III on September 1, 2010. The grand jury indicted defendant on May 10, 2012, over 20 months after the commission of the offense. However, defendant provided no reason why this argument could not have been raised on direct appeal. The record is clear from the dates set

forth in the indictment that defendant could have raised this argument at that time. Defendant's argument that the issue should not be forfeited because it would not have been addressed on direct appeal but instead reserved for a postconviction petition is pure speculation. Without any affidavits, records, or other evidence to support his claim, we find it forfeited.

¶ 33 In his second argument, defendant contends he successfully raised a claim of ineffective assistance of counsel where his attorney failed to convey a three-year plea offer made by the State. In his petition, defendant alleged his wife paid a lawyer, apparently Randall Prizy, $400 to visit him in jail in March 2013. The first thing Prizy allegedly asked him was why he did not take the three-year deal. Defendant claimed his trial counsel never told him about the State's offer.

¶ 34 "[W]hile a *pro se* petition is not expected to set forth a complete and detailed factual recitation, it must set forth some facts which can be corroborated and are objective in nature or contain some explanation as to why those facts are absent." *People v. Delton*, 227 Ill. 2d 247, 254-55, 882 N.E.2d 516, 520 (2008). The supreme court has stated "the failure to either attach the necessary 'affidavits, records, or other evidence' or explain their absence is 'fatal' to a postconviction petition [citation] and by itself justifies the petition's summary dismissal [citation]." *People v. Collins*, 202 Ill. 2d 59, 66, 782 N.E.2d 195, 198 (2002). Here, defendant's affidavit simply repeated the argument he made in his petition. Also, defendant did not attach an affidavit from Prizy, an attorney with whom he met while in jail in March 2013, or offer a reason why an affidavit could not be obtained. Defendant's failure to attach the necessary affidavits, records, or other evidence, or explain their absence, was fatal to his petition and justified its summary dismissal.

¶ 35 In his third argument, defendant argues he successfully raised a claim of

ineffective assistance of counsel where his attorney failed to impeach Newman with evidence that numerous serious charges were dismissed in Sangamon County prior to his testimony in defendant's case. According to defendant, the charges against Newman included 3 home invasions, 18 burglaries, 2 kidnappings, 5 armed robberies, 4 or 5 thefts, and 7 residential burglaries. He claimed the charges against Newman in Sangamon County were dismissed in exchange for deals made in defendant's case in Adams County. Defendant attached his own affidavit, repeating his claim that Newman was charged with numerous crimes in Sangamon County. He also stated support for his assertion could be found in a Springfield newspaper article from August or September 2010, which he did not attach to his petition.

¶ 36 Here, defendant failed to offer evidence to support his claim. In his petition, defendant made the bald allegation that Newman had more than 50 criminal charges and claimed those charges were dismissed due to his cooperation in testifying in defendant's case. Defendant offered no evidence, records, or affidavits, other than his own affidavit, to support his claim. He also failed to provide a reason why he could not provide the requisite evidence or affidavits. Instead, defendant offered nothing more than speculation. Accordingly, the lack of evidence to support his claim was fatal to defendant's petition and justified its dismissal.

¶ 37 III. CONCLUSION

¶ 38 For the reasons stated, we 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.

¶ 39 Affirmed.