

NOTICE

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FILED

September 12, 2017
Carla Bender
4th District Appellate
Court, IL

2017 IL App (4th) 150392-U

NO. 4-15-0392

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
ANTONIO SERRATO-PEREZ,)	No. 09CF2028
Defendant-Appellant.)	
)	Honorable
)	Harry E. Clem,
)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Steigmann and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed the circuit court’s order denying defendant’s postconviction petition after an evidentiary hearing, finding (1) trial counsel did not deprive defendant of his right to testify; and (2) postconviction counsel did not provide unreasonable assistance by failing to raise (a) a stand-alone claim of a deprivation of his right to testify, and (b) a claim of ineffective assistance of appellate counsel based on the sentencing court’s improper consideration of inherent elements of the offense as factors in aggravation.

¶ 2 Defendant, Antonio Serrato-Perez, appeals the circuit court’s order denying his postconviction petition after a third-stage evidentiary hearing. He contends he presented a sufficient claim that his trial counsel rendered ineffective assistance by denying him his right to testify at trial. He also contends his postconviction counsel was ineffective for failing to amend his petition to add a claim (1) he was denied his right to testify at trial, and (2) appellate counsel was ineffective for failing to allege the sentencing court considered improper factors.

¶ 3

I. BACKGROUND

¶ 4 In December 2009, defendant was charged with one count of unlawful possession with intent to deliver 60 grams of cocaine, a Class X felony (720 ILCS 570/401(a)(2)(A) (West 2008)), as a result of a September 2009 traffic stop where a canine officer conducted a walk-around search with his dog. After a 2013 jury trial, defendant was convicted of the charge and the trial court sentenced him to 12 years in prison. Defendant appealed, arguing his trial counsel rendered ineffective assistance and the evidence was insufficient to convict. In January, 2014 this court affirmed. *People v. Serrato-Perez*, 2014 IL App (4th) 130211-U, ¶ 48.

¶ 5 On April 28, 2014, defendant filed a *pro se* postconviction petition, alleging his constitutional rights were violated because the State failed to sufficiently prove the intent-to-deliver element of the offense, and his sentence was excessive. On June 10, 2014, the circuit court dismissed the petition as frivolous and patently without merit, finding the claims were either forfeited or barred by *res judicata*. Defendant filed a motion for leave to amend the petition, or in the alternative, a motion to reconsider the dismissal. Defendant sought to add a claim that appellate counsel was ineffective for failing to raise the sentencing issue on appeal. On September 3, 2014, the circuit court allowed defendant's motion and appointed counsel to represent defendant.

¶ 6 Counsel filed an amended petition, including the following claims: (1) the State's evidence was insufficient to prove defendant intended to deliver the cocaine, (2) the sentence was excessive, (3) trial counsel was ineffective by preventing defendant from testifying, (4) appellate counsel was ineffective by not filing a petition for leave to appeal to the supreme court, and (5) appellate counsel was ineffective by not raising the sentencing issue on appeal.

¶ 7 The petition proceeded to a third-stage evidentiary hearing. Defendant, who had difficulty expressing himself in English, testified he hired Tom Bruno to act as defense counsel for the trial court proceedings. However, Tom's son, Anthony Bruno, took over representation. Anthony visited defendant in jail one time for the preparation of a motion to suppress evidence. No one visited defendant to prepare for trial or discuss whether he would testify. Tom told defendant over the telephone they "wouldn't take this to trial" but would "take a plea." According to defendant, Tom and Anthony also told defendant they would "have [his] case dismissed [at] trial." Tom said "he had something up his sleeve." Defendant said he never spoke with "any of the Brunos" about what the theory of his defense would be at trial or whether he should testify.

¶ 8 Defendant said that during the trial, Anthony spoke with him about his right to testify. Defendant told Anthony he would like to testify to "tell the jury the truth." Defendant said Anthony told him: " 'I don't believe you are ready [to] testify, so I don't want you to testify, I got this. I can handle this. Leave it up to me.' " He also told him: " 'I [am] recommending you don't testify, because you don't—you don't—I don't think your testimony is going to be a good outcome. You leave it to me and just don't testify[.]' " Based on Anthony's recommendation, defendant told the judge he would not testify. Defendant said, if he had testified, he would have told the jury the drugs were not his, and that he had let "a few people" borrow his vehicle. Defendant said he would have testified he did not know there were drugs in the vehicle, although he admitted he had a "drug problem." He also admitted the amount of drugs found was an amount that could have been for his personal use. He said he tried to speak with Anthony about a possession-only charge but Anthony insisted that defendant "leave it up to him."

¶ 9 Defendant said, after he was convicted, his family hired Robert Rascia to represent him on appeal. Defendant spoke with Rascia about what he perceived as the Brunos' ineffective assistance and an excessive sentence. After the unsuccessful appeal, Rascia did not mention appealing to the supreme court. Defendant said he would have wanted to appeal his case to the higher court. Defendant rested.

¶ 10 The State called Anthony Bruno as a witness. He testified he and his father, Tony Bruno, are partners in a law firm, concentrating in criminal defense. The firm also employs Anthony's brother, Evan Bruno. They often cover for each other for any particular client, staying in close contact throughout the representation. Evan represented defendant at the hearing on his motion to suppress. Anthony said, with regard to defendant's representation, he reviewed police reports, spoke with witnesses, and spoke with defendant. In Anthony's opinion, defendant did not have a "cognitive inability to understand the spoken or written English language." Anthony said he advocated for defendant to the best of his ability during the jury trial. He did not recall whether defendant had expressed a desire to testify. Anthony said he typically discusses the right to testify with his clients. He stated:

"Well, I think ultimately that's a decision that can only be made by the defendant. I've certainly had clients who suggested before that they either want to or not want to, and I have counseled them as to what I thought would be good strategy, but being very careful to remind them that it's their constitutional right, and I can't make that decision for them."

Anthony said he could not specifically recall the judge admonishing defendant about his right to testify, but defendant chose to remain silent.

¶ 11 Anthony denied telling defendant he “had something up [his] sleeve,” although he did prepare, file, and argue an unsuccessful motion to dismiss on speedy-trial grounds. He said it never appeared to him that defendant, due to a language barrier, did not understand the trial court proceedings. Defendant never expressed the need for an interpreter.

¶ 12 Anthony testified he did not recall telling defendant that his testimony would not be helpful if he testified at trial. He also did not recall whether he recommended that defendant testify. He believed part of his defense strategy was to attack the fact there were no fingerprints found on the Baggie, and no other items were found that would tend to demonstrate an intent to deliver. He could not recall whether he made a recommendation to defendant regarding his right to testify. Anthony stated:

“I don’t know—I don’t know what I recommended, if I recommended anything to [defendant]. I’m sure, as my practice is in criminal cases, to tell him [‘]hey, this isn’t my call, this is your call, and I can’t take it away from you, and I can’t make the decision for you.[’] But I guess I wouldn’t be surprised if I made a recommendation to him about what I thought he should do or shouldn’t do.”

Anthony said defendant’s “position throughout the life of the case was that he was a hundred percent innocent, and that he knew nothing of these drugs.” So, defendant’s stated position that he had hoped to work out a plea bargain was inconsistent with his position relayed to Anthony.

¶ 13 After considering the evidence and arguments of counsel, the trial court took the matter under advisement. On May 5, 2015, the court entered a written order denying defendant’s petition. The court found (1) defendant’s claim that the evidence was insufficient to prove the intent-to-deliver element of the offense had been raised and rejected on direct appeal and was now barred by *res judicata*; (2) defendant’s claim of an excessive sentence was heard and denied

in a postsentencing hearing and, although not raised on direct appeal, it was not subject to a claim of ineffective assistance of appellate counsel, and is now barred by *res judicata*; (3) defendant failed to demonstrate prejudice with regard to his claim that Anthony Bruno was ineffective for preventing him from testifying at trial; (4) defendant failed to demonstrate prejudice with regard to his claim appellate counsel was ineffective for failing to file a petition for leave to appeal to the supreme court after an unsuccessful direct appeal; and (5) defendant failed to demonstrate prejudice with regard to his claim appellate counsel was ineffective for failing to raise an excessive-sentence issue on direct appeal. This appeal followed.

¶ 14

II. ANALYSIS

¶ 15 Defendant raises two primary issues on appeal. First, he contends the circuit court erred in denying his postconviction claim that trial counsel was ineffective for preventing him from testifying at trial. Second, he contends his postconviction counsel was ineffective for failing to amend the petition to include a claim that (1) defendant was denied his right to testify and (2) appellate counsel was ineffective for failing to allege the sentencing court considered an improper factor.

¶ 16

A. Did Trial Counsel Render Ineffective Assistance?

¶ 17 In his postconviction petition, defendant alleged trial counsel Anthony Bruno was ineffective because he denied defendant his right to testify at trial. Defendant claims the circuit court's rejection of this claim was manifest error. We have previously held the proper standard of review, after a third-stage evidentiary hearing on a claim of ineffective assistance of counsel where the facts are undisputed, is not manifest error, but *de novo*. *People v. Coleman*, 2015 IL

App (4th) 131045, ¶ 67. Typically, review of a claim of ineffective assistance of counsel involves a mixed question of law and fact, and therefore, a hybrid standard of review would apply. *Coleman*, 2015 IL App (4th) 131045, ¶ 66. Here, the parties agree the circuit court did not address any disputed issues of fact. Therefore, the issue is whether the evidence presented at the hearing demonstrated that counsel's performance was objectively unreasonable. We will review that issue under a *de novo* standard. See *Coleman*, 2015 IL App (4th) 131045, ¶ 66 (we review the ultimate legal question of whether counsel rendered ineffective assistance under a *de novo* standard of review).

¶ 18 A claim of ineffective assistance of counsel has two elements: (1) counsel's performance fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A defendant must satisfy both prongs of the *Strickland* standard, and the failure to satisfy either prong precludes a finding of ineffective assistance of counsel. *People v. Houston*, 226 Ill. 2d 135, 144-45 (2007). However, when a case is more easily decided on the ground of lack of sufficient prejudice, rather than that counsel's representation was constitutionally deficient, the court should do so. *Strickland*, 466 U.S. at 697. “ ‘[I]n a post-conviction hearing the burden of proof is upon the petitioner to show a denial of [a] constitutional right by a preponderance of the evidence.’ ” *People v. Coleman*, 2013 IL 113307, ¶ 92 (quoting *People v. Stovall*, 47 Ill. 2d 42, 47 (1970)).

¶ 19 According to defendant, Anthony Bruno's performance was deficient when he (1) never discussed defendant's right to testify with him, (2) never discussed the benefits or hazards of testifying, and (3) pressured him into waiving his right to testify in the middle of the trial.

Defendant said he wanted to testify at trial, but Anthony told him his testimony would not be helpful.

¶ 20 During defendant's trial, the following exchange occurred:

“THE COURT: Likewise if you wanted to be a witness, no one can keep you from being a witness. You have a right to testify if you want to. You understand that?

DEFENDANT: Yes.

THE COURT: It's a matter that should be—a decision that should be made after consultation with your lawyer. After consulting with your lawyer, you have decided you are not going to be a witness in this case, is that correct?

DEFENDANT: Say that again, Your Honor.

THE COURT: I'm sorry.

DEFENDANT: No.

THE COURT: You've talked with Mr. Bruno about this?

DEFENDANT: Yes.

THE COURT: And after that discussion, you have decided you are not going to testify?

DEFENDANT: Yes.

THE COURT: Is that correct?

DEFENDANT: Yeah, I'm not going to testify.”

¶ 21 The trial court did not ask trial counsel whether he discussed the matter with defendant but, according to defendant, they did talk about it. During the court's questioning, defendant did not contemporaneously assert that he wished to testify. See *In re Joshua B.*, 406

Ill. App. 3d 513, 515 (2011) (citing *People v. Shelton*, 252 Ill. App. 3d 193, 201 (1993) (a defendant's conviction cannot be reversed where a defendant contends on appeal he was prevented from testifying at trial unless he contemporaneously asserted his right to testify by informing the trial court he wished to do so)).

¶ 22 This court has addressed this issue before under similar circumstances, but on direct appeal rather than on appeal from postconviction proceedings. See *People v. McCleary*, 353 Ill. App. 3d 916 (2004). In *McCleary*, the defendant claimed his trial counsel rendered ineffective assistance when he failed to advise defendant of his right to testify and ignored his request to testify. *McCleary*, 353 Ill. App. 3d at 921. We reiterated the principle that the decision to testify is defendant's alone, but that decision should be made with the advice of counsel. *McCleary*, 353 Ill. App. 3d at 922-923 (citing *People v. Smith*, 176 Ill. 2d 217, 235 (1997)). However, "when on appeal a defendant contends he was precluded from testifying, the conviction will not be reversed unless the defendant contemporaneously informed the trial court that he wished to testify." *McCleary*, 353 Ill. App. 3d at 923 (citing *Smith*, 176 Ill. 2d at 234).

¶ 23 At the evidentiary hearing, defendant said he would have testified before the jury at trial that (1) the cocaine was not his; (2) he had no knowledge of it being in his truck; (3) he worked over 80 hours per week, and thus, he did not need, or have the time, to sell drugs; and (4) he had allowed others to borrow his truck. The problem with defendant's claim of ineffective assistance of counsel is that defendant did not "contemporaneously inform[] the trial court that he wished to testify" as suggested in *McCleary*. That is, defendant cannot claim he was precluded from testifying by counsel when he failed to assert his right to testify by informing the trial court during the court's questioning that he wished to do so. *Smith*, 176 Ill. 2d at 234.

Defendant specifically and unequivocally told the court he discussed the issue with counsel and decided not to testify.

¶ 24 Defendant failed to successfully demonstrate either prong of the *Strickland* standard. First, he failed to prove counsel's performance fell below an objective standard of reasonableness. Defendant failed to prove counsel refused to allow him to testify at trial. On the witness stand at the evidentiary hearing, defendant said he told Anthony during the trial: " 'I would like to testify if you want me to[.]' " According to defendant, Anthony told him " 'I [am] recommending you don't testify, because *** I don't think your testimony is going to be a good outcome.' " This does not indicate Anthony refused to allow defendant to testify or that counsel somehow otherwise denied defendant his right to testify. In fact, defendant's affidavit in support of his amended postconviction petition stated: "Mr. Bruno told me that I could testify if I wanted to."

¶ 25 Based on the record and evidence presented at the evidentiary hearing, we conclude defendant knowingly waived his right to testify. This conclusion is based on the following facts: (1) defendant told the trial court he had discussed the issue with counsel, (2) counsel testified the decision whether to testify was left to defendant's discretion, (3) defendant admitted counsel told him he could testify if he wanted, and (4) defendant told the trial court he did not want to testify. These facts are the bases for our decision that trial counsel was not ineffective by denying defendant his right to testify. The circuit court did not err in denying defendant's postconviction petition on this issue.

¶ 26 B. Did Postconviction Counsel Render Ineffective Assistance?

¶ 27 Next, defendant contends his postconviction counsel was ineffective for failing to amend the petition to include a claim that (1) defendant was denied his right to testify, and (2) appellate counsel was ineffective for failing to allege the sentencing court considered an improper factor.

¶ 28 A defendant's right to postconviction counsel is wholly statutory. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). "Therefore, a petitioner is entitled only to the level of assistance required" under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2014)). *Perkins*, 229 Ill. 2d at 42. Under the Act, a defendant is entitled only to reasonable assistance of counsel. *Perkins*, 229 Ill. 2d at 42. Reasonable assistance of counsel is premised on counsel's compliance with Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013). See *Perkins*, 229 Ill. 2d at 42. Although strict compliance is not necessary, postconviction counsel must substantially comply with Rule 651(c). Our review is *de novo*. *People v. Mason*, 2016 IL App (4th) 140517, ¶ 19.

¶ 29 Under Rule 651(c), postconviction counsel must file a certificate indicating he or she "has consulted with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights, has examined the record of the proceedings at the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions." Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). Here, counsel filed an amended postconviction petition, but it did not include a stand-alone claim that defendant was denied his right to testify. Counsel alleged only that trial counsel was ineffective for denying defendant's right to testify. Defendant claims his burden of proof was greater when the issue was framed as one of ineffective assistance of counsel because both prongs of the *Strickland* standard must have been proved. However, if counsel presented a stand-

alone claim, defendant would have been required to prove only that a preponderance of the evidence demonstrated his right was denied, without having to prove prejudice.

¶ 30 As stated above, we conclude defendant's claim that he was deprived of his right to testify is without merit. The record sufficiently establishes no error either on the part of counsel or the trial court. Defendant knowingly waived his right to testify after being advised by the trial court and, according to defendant, by counsel that the decision was his. He indicated he spoke with counsel, and he thereafter decided against taking the stand. Because defendant's claim of constitutional deprivation is without merit, postconviction counsel is not obligated "to advance frivolous or spurious claims." *People v. Greer*, 212 Ill. 2d 192, 205.

¶ 31 Finally, defendant contends postconviction counsel should have included a claim in his amended petition that appellate counsel was ineffective for failing to address the sentencing court's erroneous consideration of certain factors in aggravation. Defendant claims the sentencing court considered factors that were inherent in the crime, namely that defendant is "a drug dealer," and cocaine is a "powerful drug." The relevant portions of the sentencing hearing are as follows:

"The court has considered all relevant information. The court has specifically considered matters in aggravation and in mitigation. The court has considered the rehabilitative potential of the defendant. The court has sought to enter an order that would be consistent with the offense committed and also serve as a deterrent for others who might consider committing such an offense.

It will be the order of the court that the defendant be sentenced to a period of incarceration in the Illinois Department of Corrections of 12 years. ***

The defendant in a number of respects has positive character traits. He apparently is a hard-working person. He apparently is a person who has tried to improve himself by pursuing education. He has cooperated with those who tried to help him. The defendant has been employed in the past.

The defendant has been convicted of a Class X felony. The sentencing range is 6 to 30 years. The court believes and would state for the record that it is not finding this to be a crime of violence as I believe the legislature intended that term to be considered in this context.

However, the sale of drugs is a plague on this and every community. It is an occupation that promotes violence. It certainly is a matter where anyone who consumes the drugs sold suffers adverse effects from using the drugs. Sometimes severe effects, addictive effects, effects that lead to the commission of crimes to get money to buy more drugs.

The defendant says that this is the first crime he's committed in 30 years which isn't quite true. He came into this country illegally. He was sent back. He came into the country again illegally.

And I do understand that he made appropriate strides when people approached him and tried to help him with his education, even ministered to him while he was in jail. But the court can't help but wonder whether [defendant] is even being honest with himself let alone the people who tried to help him when he says that he had \$6,000 worth of drugs in his possession for personal use.

Also, there wasn't any drug paraphernalia or other things that would indicate personal use, and the jury disbelieved the proposition that such a large amount of drugs could possibly be for only personal use, 60 grams, and we heard extended testimony about what a person would customarily use for personal use.

The defendant has dependents, and the court would believe that being apart from them would be certainly a hardship on them; but the court can't help but wonder where with his—the type of employment that [defendant] had that he could amass \$6,000 to buy drugs other than by selling drugs and I believe that's the same inference that the jury drew so the court does not believe a minimum sentence is appropriate because of his potential and it certainly is a tragedy that he made the decision he did when he could have made others and perhaps worked his way into citizenship here in the country, but no. He chose to be a drug dealer, an offense for which he's now been convicted.

He can further his education in the Department of Corrections if he chooses to do so. He can gain additional job skills in the Department of Corrections, but the court believes that a strong message to anyone who would consider selling drugs, particularly a powerful drug like cocaine, must be sent and that is the reason along with the other matters just mentioned that the court has entered the order that it did.”

It is clear to this court that the sentencing court relied heavily on the need for deterrence, rather than improperly considering the harm to society as an aggravating factor. In *People v. McCain*, 248 Ill. App. 3d 844, 852 (1993), the Second District considered to what

extent a sentencing court may consider the societal harms of drug-related offenses. The court stated:

“It is not improper *per se* for a sentencing court to refer to the significant harm inflicted upon society by drug trafficking. It is important that defendants understand why they are subject to the penalties provided by law and why they have received their particular sentences. The harm that the crime causes society is an inherent consideration which underlies the basic range of penalties specified by the legislature. Commenting on the problems caused by drug-related crime encourages rehabilitation by providing a context in which a defendant may develop feelings of remorse. We do not wish to discourage courts from addressing such relevant considerations, but we suggest that sentencing courts attempt to segregate such general commentary from the balancing of sentencing factors.”
McCain, 248 Ill. App. 3d at 852.

¶ 32 When the entire context of the sentencing court’s findings are reviewed, it is clear the court did not concentrate on the harm to society as an aggravating factor. Instead, the court concentrated on the need for deterrence by mentioning the harm with the hope of encouraging defendant to engage in rehabilitation with the pursuit of education and obtaining job skills. We do not find the court erred in its commentary.

“Claims of ineffective assistance of appellate counsel are also evaluated under the *Strickland* test. [Citation.] ‘A defendant who claims that appellate counsel was ineffective for failing to raise an issue on appeal must allege facts demonstrating that such failure was objectively unreasonable and counsel’s decision prejudiced [him]. If the underlying issue is not meritorious, then

defendant has suffered no prejudice.’ [Citation.] ‘[I]t is not incompetence of counsel to refrain from raising issues that in his judgment are without merit.’ ” *People v. Alberts*, 383 Ill. App. 3d 374, 379 (2008) (quoting *People v. Enis*, 194 Ill. 2d 361, 377 (2000), and *People v. Mitchell*, 189 Ill. 2d 312, 332 (2000)).

¶ 33 Having found no error, it was not objectively unreasonable or prejudicial for appellate counsel to not have raised the issue on direct appeal. See *Enis*, 194 Ill. 2d at 377. As such, and as stated above, postconviction counsel was not obligated to bring nonmeritorious issues before the circuit court in the postconviction proceedings. See *Greer*, 212 Ill. 2d at 205 (requirements of Rule 651(c) do not obligate counsel to advance frivolous or spurious claims in a postconviction petition). The record before us indicates postconviction counsel sufficiently complied with Rule 651(c) by amending defendant’s petition as necessary so as to adequately present defendant’s claims. Defendant failed to establish postconviction counsel’s assistance was unreasonable. See *Perkins*, 229 Ill. 2d at 42 (a defendant is entitled to a reasonable level of assistance of postconviction counsel).

¶ 34

III. CONCLUSION

¶ 35 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$75 statutory assessment against defendant as costs of this appeal.

¶ 36 Affirmed.