

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) 160472-U

NO. 4-16-0472

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

July 26, 2017

Carla Bender

4th District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Adams County
TOUSSAINT L. SMITH,)	No. 11CF682
Defendant-Appellant.)	
)	Honorable
)	Robert K. Adrian,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Holder White and Pope concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly dismissed defendant’s postconviction petition; defendant failed to make a substantial showing he was denied the effective assistance of counsel when trial counsel failed to seek a dismissal under the compulsory-joinder statute.

¶ 2 In June 2012, a jury found defendant, Toussaint L. Smith, guilty of criminal drug conspiracy (720 ILCS 570/405.1 (West 2010) (conspiracy to commit controlled substance trafficking (720 ILCS 570/401.1 (West 2010 (more than 1 gram but less than 15 grams of cocaine))). In July 2012, the trial court sentenced defendant to a prison term of 12 1/2 years. This conviction for criminal drug conspiracy followed an earlier prosecution of defendant for four counts of unlawful delivery of a controlled substance (720 ILCS 570/401 (West 2010)). The earlier prosecution had been dismissed after discovery violations by the State and before the

prosecution for criminal drug conspiracy began.

¶ 3 In December 2014, defendant initiated proceedings under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2014)). In his *pro se* petition and two later amended petitions, defendant asserted he was denied the effective assistance of trial counsel when counsel failed to seek a dismissal of his case under the compulsory-joinder rules. Defendant asserted the prosecution for criminal drug conspiracy should have been brought simultaneously with the earlier prosecution for unlawful delivery.

¶ 4 In May 2016, upon the State's motion, the trial court dismissed defendant's petition, holding a motion to dismiss under the compulsory-joinder rules would not have been granted. Defendant appeals. We affirm.

¶ 5 I. BACKGROUND

¶ 6 In March 2011, in Adams County case No. 11-CF-156, the State charged defendant with four counts of unlawful delivery of a controlled substance (720 ILCS 570/401 (West 2010)). The four counts involved four separate deliveries occurring over a period of three separate days: delivery of ecstasy on March 2, 2011, two instances of delivery of cocaine on March 14, 2011, and delivery of cocaine on March 18, 2011. Each delivery occurred in the Quincy apartment where defendant and his girlfriend, Layla Findley, resided. Each delivery was videotaped and involved the same confidential source. In August 2011, the trial court dismissed the charges of unlawful delivery of a controlled substance against defendant, finding the State committed discovery violations.

¶ 7 In November 2011, defendant was charged with criminal drug conspiracy (720 ILCS 570/405.1 (West 2010)). The State alleged between March 12 and March 18, 2011,

defendant agreed with another to commit controlled substance trafficking (720 ILCS 570/401.1 (West 2010)) and provided the finances or direction to facilitate the offense.

¶ 8 Before trial, defendant's trial counsel moved to dismiss the case, alleging the new charge resulted in a "double jeopardy violation[]." The State countered the previously charged offenses contained different elements and, therefore, the new charge was not barred by double jeopardy. The trial court agreed with the State and denied defendant's motion to dismiss.

¶ 9 At trial, the State presented evidence showing Tyler Douglas, a confidential informant, worked with the Quincy police department to purchase drugs from defendant. Douglas, under instructions from Quincy police, purchased ecstasy pills from defendant in defendant's apartment on March 2, 2011. Findley was present during the transaction. Douglas purchased crack cocaine from defendant two separate times on March 14, 2011, and again on March 18, 2011.

¶ 10 At trial, Findley testified she agreed to travel to St. Louis, Missouri, on March 15, 2011, to purchase crack cocaine for her and defendant to sell in Quincy. Defendant gave Findley \$200 for that purpose. Findley was unable to find crack cocaine for purchase in St. Louis. However, on the return drive to Quincy, Findley purchased 3 grams of crack cocaine for \$150.

¶ 11 The jury found defendant guilty of criminal drug conspiracy. The trial court sentenced defendant to 12 1/2 years' imprisonment.

¶ 12 Defendant pursued a direct appeal, arguing, in part, the State failed to prove him guilty beyond a reasonable doubt and his conviction should be overturned due to the State's vindictive prosecution. *People v. Smith*, 2013 IL App (4th) 120677-U, ¶ 44. This court affirmed defendant's conviction. *Id.*

¶ 13 In December 2014, defendant filed his *pro se* postconviction petition, asserting, in part, he was denied effective assistance of counsel when his trial counsel failed to move to dismiss the case upon the State’s violation of the compulsory-joinder statute, section 3-3 of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/3-3 (West 2010)). Postconviction counsel filed two amended petitions, asserting the same claim and adding the claim appellate counsel provided ineffective assistance by not raising the compulsory-joinder claim on direct appeal. The State moved to dismiss the petition.

¶ 14 The trial court dismissed defendant’s postconviction petition. The court found a motion to dismiss based on compulsory joinder would have failed:

“The record indicates trial counsel filed a motion to dismiss based on double[-]jeopardy violations that the court denied. Many of the considerations on the issue of double jeopardy are the same for mandatory joinder. Petitioner has not made a substantial showing that a motion to dismiss based on mandatory joinder would have been successful.”

¶ 15 This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 Defendant appeals the second-stage dismissal of his postconviction petition. The Act provides a three-stage process by which a defendant may petition for the postconviction review of a claim his conviction led to a substantial denial of constitutional rights. *People v. Cotto*, 2016 IL 119006, ¶ 26, 51 N.E.3d 802. In the first stage, the trial court decides whether a filed petition is frivolous or patently without merit. *People v. Andrews*, 403 Ill. App. 3d 654,

658, 936 N.E.2d 648, 652-53 (2010). If the court does not dismiss the petition as frivolous or patently without merit, the postconviction claim advances to the second stage, at which the court may appoint counsel and *pro se* petitions may be amended. *Id.* at 659, 936 N.E.2d at 653. The State may answer the petition or move to dismiss it. 725 ILCS 5/122-5 (West 2014). After the State files a motion to dismiss, the court will grant the motion if the petition's allegations, supported by the trial record or accompanying affidavits, fail to make a substantial showing the petitioner's constitutional rights were violated. See *People v. Morgan*, 187 Ill. 2d 500, 528, 719 N.E.2d 681, 697 (1999); see also *Andrews*, 403 Ill. App. 3d at 658, 936 N.E.2d at 653; 725 ILCS 5/122-5 (West 2014). Our review of the trial court's judgment is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 389, 701 N.E.2d 1063, 1075 (1998).

¶ 18 In his amended petition, defendant asserts he was denied the effective assistance of trial and appellate counsel when (1) trial counsel moved to dismiss the State's case based on a theory of double jeopardy instead of seeking a dismissal under the theory of compulsory joinder, and (2) appellate counsel did not raise the issue on direct appeal. Claims of ineffective assistance of counsel are considered pursuant to the framework set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, to establish an ineffectiveness claim, a defendant must show counsel's performance was deficient and substantially prejudiced defendant. *Id.* at 687. To prove deficient performance and substantial prejudice, a defendant must show (1) counsel's representation fell below an objective standard of reasonableness, and (2) absent counsel's error, there exists a reasonable probability the proceeding's outcome would have been different. *People v. Young*, 341 Ill. App. 3d 379, 383, 792 N.E.2d 468, 472 (2003). When a defendant argues appellate counsel provided ineffective assistance for failing to raise an issue on appeal, defendant

must also set forth facts showing the failure was objectively unreasonable and the failure prejudiced defendant. *People v. Rogers*, 197 Ill. 2d 216, 223, 756 N.E.2d 831, 835 (2001). “If the underlying issue is nonmeritorious, the defendant has suffered no prejudice.” *Id.*

¶ 19 Defendant’s ineffective-assistance claim turns on the merits of his argument. He argues section 3-3 of the Criminal Code (720 ILCS 5/3-3 (West 2010)) barred his prosecution for criminal drug conspiracy because the charge should have been prosecuted with the unlawful-delivery charges that were dismissed in case No. 11-CF-156. Defendant contends his conduct in March 2011 in committing the drug offenses arose from the same set of facts—facts known to the prosecution—and thus, according to the compulsory-joinder statute, should have been brought at the same time. Defendant maintains had counsel asserted this argument there exists a reasonable probability the trial court would have dismissed the prosecution.

¶ 20 In support of his ineffective-assistance claim, defendant cites our decision in *People v. Hasselbring*, 2014 IL App (4th) 131128, ¶ 29, 21 N.E.3d 762. Defendant contends *Hasselbring* holds, under the compulsory-joinder provision (720 ILCS 5/3-3 (West 2010)), a prosecution is generally barred if (1) there was a prior prosecution, (2) the offense charged in the current prosecution was known to the prosecutor at the time the prior offense was commenced, and (3) both prosecutions arise from the same set of facts.

¶ 21 The State counters the current prosecution is not barred by the rule of compulsory joinder. Relying on *People v. Mueller*, 109 Ill. 2d 378, 488 N.E.2d 523 (1985), the State contends the latter prosecution is barred only if both prosecutions arise from the same act—not the same set of facts, as defendant contends. The State maintains the unlawful-delivery charges in case No. 11-CF-156 involve a separate act than the facts underlying the current prosecution

for criminal drug conspiracy. The State concludes a motion to dismiss for compulsory joinder would not have been granted, and thus, it was objectively reasonable for trial counsel to not raise the issue and defendant suffered no prejudice.

¶ 22 We agree with the State and find the compulsory-joinder statute did not bar the prosecution of defendant for criminal drug conspiracy. The compulsory-joinder statute appears in section 3-3 of the Criminal Code, which provides the following, in part:

“Multiple Prosecutions for Same Act. (a) When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense.

(b) If the several offenses are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution *** if they are based on the same act.” 720 ILCS 5/3-3 (West 2010).

¶ 23 In *Mueller*, the Supreme Court of Illinois interpreted the meaning of “based on the same act” in section 3-3 and settled the question of whether the offenses must arise from the same set of facts or from the same act. *Mueller*, 109 Ill. 2d at 385, 488 N.E.2d at 527. In *Mueller*, the defendant shot and killed two individuals in Scott County. *Id.* at 381, 488 N.E.2d at 525. Defendant dumped the bodies in a Cass County creek. *Id.* In Scott County, the State charged defendant with two counts of murder. At trial, defendant argued self-defense and was acquitted. *Id.* Approximately 10 days after the acquittal, the State charged the defendant with one count of

homicidal concealment in Cass County. *Id.* The defendant was convicted and appealed, arguing he was engaged in “a single course of homicidal concealment for which ‘he could have been convicted’ in the *** murder prosecution.” *Id.* at 382, 488 N.E.2d at 526.

¶ 24 The *Mueller* court determined compulsory joinder did not bar the latter prosecution because the murder and concealment charges were not “based on the same act.” *Id.* at 385, 488 N.E.2d at 527. The court found it irrelevant that the shootings and the act of concealment were related and concluded, “[t]here is no requirement of joinder where multiple offenses arise from a series of related acts.” *Id.* The *Mueller* court concluded the compulsory-joinder statute “is not intended to cover the situation in which several offenses *** arise from a series of acts which are closely related with respect to the offender’s single purpose or plan.” (Internal quotation marks omitted.) *Id.*

¶ 25 In 1993, the Second District reached a similar conclusion when it held the simultaneous possession of a stolen scale and the possession of a controlled substance with the intent to deliver were not based on the same act and compulsory joinder did not require the two charges be prosecuted simultaneously. *People v. Astorga*, 245 Ill. App. 3d 124, 131-32, 613 N.E.2d 779, 783-84 (1993). The *Astorga* court relied on *Mueller*, emphasizing multiple offenses arising from a series of related acts need not be joined.

¶ 26 Contrary to defendant’s misstatement, *Hasselbring* interpreted section 3-3 in the same manner as did the courts in *Mueller* and *Astorga*. In his brief, defendant cites *Hasselbring* as supporting the conclusion compulsory joinder bars separate prosecutions of offenses when “both prosecutions arise from the same set of facts.” We did not so hold. In discussing section 3-3(b) of the Criminal Code, we held compulsory joinder bars the later claim only if “both

prosecutions arise from the same act.” *Hasselbring*, 2014 IL App (4th) 131128, ¶ 29, 21 N.E.3d 762.

¶ 27 The unlawful-delivery charges in case No. 11-CF-156 and the criminal-drug-conspiracy charges are not based on the same act. The charges in case No. 11-CF-156 are based on the act of the alleged delivery of ecstasy and crack cocaine to the confidential informant. See *Smith*, 2013 IL App (4th) 120677-U, ¶ 64. In contrast, here, the charges are based on the agreement between defendant and Findley to purchase crack cocaine in Missouri for the purpose of delivery and defendant’s financing or directing Findley to facilitate the offense. See *id.* ¶ 53. The acts, though related, are not the same. The compulsory-joinder statute does not require the prosecutions occur simultaneously.

¶ 28 Defendant acknowledges “later precedent” narrowly construed the term “act,” but he urges this court to not strictly follow that precedent when the dismissed case involved prosecutorial misconduct. This argument fails. *Mueller*, a decision by the Supreme Court of Illinois, is binding. See *Mekertichian v. Mercedes-Benz U.S.A., L.L.C.*, 347 Ill. App. 3d 828, 836, 807 N.E.2d 1165, 1171 (2004). Neither *Mueller* nor section 3-3 of the Criminal Code articulates an exception from the compulsory-joinder rules to allow this court to ignore the “same act” prerequisite. We will not add one. See generally *Solich v. George & Anna Portes Cancer Prevention Center of Chicago, Inc.*, 158 Ill. 2d 76, 83, 630 N.E.2d 820, 823 (1994) (“Where an enactment is clear and unambiguous, as this one is, a court is not at liberty to depart from the plain language and meaning of the statute by reading into it exceptions, limitations or conditions that the legislature did not express.”); 720 ILCS 5/3-3 (West 2010).

¶ 29 A motion to dismiss based on compulsory joinder would have failed. Defendant

has not made a substantial showing his constitutional right to the effective assistance of counsel was violated by his conviction. Defendant's allegations do not show it was objectively unreasonable for trial counsel not to pursue a dismissal based on compulsory joinder or that he suffered no prejudice as a result of counsel's failure to file an unmeritorious motion. Because the underlying case lacks merit, appellate counsel cannot be ineffective for failing to raise the issue on direct appeal. See *Rogers*, 197 Ill. 2d at 223, 756 N.E.2d at 835.

¶ 30 Having found the trial court properly concluded defendant made no substantial showing of a constitutional deprivation and the dismissal was proper, we need not address the State's claim defendant's postconviction petition was untimely.

¶ 31 III. CONCLUSION

¶ 32 We affirm the trial court's judgment. We award the State its \$50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-202 (West 2016).

¶ 33 Affirmed.