2018 IL App (1st) 152240-U

No. 1-15-2240

Order filed January 18, 2018

Fourth Division

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).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 3306
	)	
SERGIO BARRERA,	)	Honorable
	)	Nicholas R. Ford,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices Gordon and Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: Summary dismissal of defendant's postconviction petition affirmed over his claims of ineffective assistance of trial counsel and appellate counsel.

¶ 2 Defendant Sergio Barrera appeals the summary dismissal of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). He contends that the trial court erroneously dismissed his petition where he made several arguably meritorious

claims of ineffective assistance of trial and appellate counsel. For the following reasons, we affirm.

¶ 3 Following a jury trial, defendant was convicted of delivery of a controlled substance (720 ILCS 570/401(a)(2)(B) (West 2008) (delivery of 100 grams or more but less than 400 grams of cocaine)), and sentenced to 14 years' imprisonment. We set forth the facts of the case in defendant's direct appeal (*People v. Barrera*, 2013 IL App (1st) 113087-U), and we recite them here to the extent necessary to our disposition.

¶ 4 The evidence at trial established that, on November 12, 2009, undercover sheriff's police investigator Mack, working as part of a narcotics team, arranged to purchase 4.5 ounces of cocaine for $3,200 from co-defendant Nancy Balthazar,[1] with whom he had four previous dealings. Mack, driving a covert vehicle, met Balthazar at a gas station around 7 p.m., and Balthazar stated she had to get the cocaine from a friend at a different gas station. Mack and Balthazar relocated to another gas station, and Balthazar made a telephone call.

¶ 5 Shortly thereafter, a silver vehicle with two individuals pulled into the gas station. Balthazar stated, "That's my guy," and walked over to defendant, who was seated in the passenger-side of the silver vehicle. Mack observed defendant and Balthazar have a conversation, after which defendant handed Balthazar an item. Balthazar tucked the item close to her body and returned to Mack's covert vehicle. She then gave the item to Mack in exchange for $3,200 in prerecorded funds. Following the transaction, the narcotics team arrested defendant, Balthazar, and the silver vehicle's driver.

[1] Co-defendant's last name is spelled both "Baltazar" and "Balthazar" throughout the record. For purposes of clarity, we refer to her as "Balthazar," the spelling she used during her testimony.

¶ 6 Investigator Calvin Blanchard, a surveillance officer during the transaction, corroborated Mack's testimony. Balthazar, who pled guilty to delivery of a controlled substance (720 ILCS 570/401(a)(2)(A) (West 2008) (delivery of 15 grams or more but less than 100 grams of cocaine)), and was sentenced to seven years' imprisonment, also corroborated Mack's testimony.

¶ 7 Following his arrest, defendant was *Mirandized* and gave a voluntary statement, memorialized in writing, which was admitted into evidence and read to the jury. The statement read that, on November 12, 2009, defendant's friend "Bluto" asked him to deliver 4.5 ounces of cocaine in exchange for $300. Bluto told defendant a woman would call him to direct him to a particular location. Defendant received a call from a woman around 7 p.m., and later received a second call directing him to the gas station. He met the woman at the gas station and gave her the cocaine, and was subsequently arrested. The statement was signed by defendant.

¶ 8 Despite defendant's confession, Mack released defendant and instructed him to check in twice a week with information so that Mack could identify a larger drug target. Defendant provided no further information and was rearrested two months later.

¶ 9 Defendant testified on his own behalf and denied delivering drugs to Balthazar. He testified that, on November 12, 2009, he went with his brother-in-law for dinner, and instead his brother-in-law drove to the gas station. At the gas station, "a complete stranger" approached the driver's side of their vehicle and spoke with his brother-in-law, although defendant did not pay attention to the conversation. Defendant was arrested soon after, and he signed the statement without reading it because the police told him he could go home after signing it. Mack later rebutted defendant's testimony.

¶ 10 Following arguments, the jury found defendant guilty of delivery of more than 100 grams but less than 400 grams of cocaine. The court subsequently sentenced defendant to 14 years' imprisonment. We affirmed defendant's conviction and sentence on direct appeal. *Barrera*, 2013 IL App (1st) 113087-U.

¶ 11 On direct appeal, defendant argued, *inter alia*, that his sentence was excessive based on his background and potential for rehabilitation and that the trial court failed to consider statutory sentencing factors. *Barrera*, 2013 IL App (1st) 113087-U, ¶ 35. We held, in relevant part, that defendant forfeited his review of the sentencing issue because he failed to challenge his sentence in a postsentencing motion and failed to include the sentencing transcript in the record on appeal. *Id.* at ¶¶ 36-36. In reaching this conclusion, however, we noted that defendant's sentence was presumptively proper because it was within the permissive sentencing range and, without a sufficient record, nothing rebutted that presumption. *Id.* at ¶35. Further, this court rejected defendant's argument that his 14-year sentence was excessive based on Balthazar's 7-year sentence, because Balthazar pled guilty. *Id.* at ¶ 36. Our supreme court subsequently denied defendant's petition for leave to appeal. *People v. Barrera*, 20 N.E.3d 1250 (2014).

¶ 12 On February 27, 2015, defendant mailed to the court a *pro se* postconviction petition. In pertinent part, the petition alleged that trial counsel was ineffective for failing to present mitigation witnesses to testify at defendant's sentencing hearing, and appellate counsel was ineffective for failing to include his sentencing transcript in the record on appeal.

¶ 13 In support of his petition, defendant attached the transcript from his sentencing hearing. At the sentencing hearing, the State argued in aggravation that defendant "was a major player in this case," which involved 112.3 grams of cocaine. The State further noted defendant's prior

conviction for driving under the influence. Trial counsel argued that the presentence investigation report (PSI) reveals defendant had an "extraordinary work record," was a young man, supported his children, and had a "stellar background." In imposing the 14-year sentence, the court noted that it considered the PSI, the arguments in aggravation, and mitigation, as well as the large quantity of cocaine involved in the case.

¶ 14 Defendant additionally attached to his petition nine signed statements from various family members, friends, and neighbors as purported mitigation evidence. Three of the nine statements note that the respective authors would have testified on defendant's behalf, but were not contacted to testify. None of the statements were notarized. All of the statements emphasize that defendant is a good, reliable person, who cares for and supports his family.

¶ 15 On May 29, 2015, the trial court entered an order summarily dismissing defendant's postconviction petition, finding that defendant's claims were frivolous and patently without merit. This appeal followed.

¶ 16 On appeal, defendant contends that the trial court erred by dismissing his petition at the first stage of postconviction proceedings because his claims of ineffective assistance of counsel were not indisputably meritless.

¶ 17 The Act allows criminal defendants to challenge their convictions or sentences on grounds of constitutional violations. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008). At the first stage of postconviction proceedings, the trial court must independently review the petition, taking the allegations as true, and determine whether the petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2014). A petition 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 (2009); *People v. Tate,* 2012 IL 112214, ¶ 9. A claim has no arguable basis when it is based on an indisputably meritless legal theory, such as one completely contradicted by the record, or a fanciful factual allegation, such as those that are fantastic or delusional. *People v. Brown,* 236 Ill. 2d 175, 185 (2010).

¶ 18 To survive the first stage, a petition need only present the gist of a constitutional claim. *People v. Allen*, 2015 IL 113135, ¶ 24. Presenting a "gist" of a constitutional claim is a low threshold, and only limited detail is necessary for the petition to proceed beyond the first stage of postconviction review, as opposed to setting forth a claim in its entirety. *Hodges,* 234 Ill. 2d at 9; *People v. Williams,* 364 Ill. App. 3d 1017, 1022 (2006). We review the summary dismissal of a petition *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶ 19 To state a claim of ineffective assistance of counsel in first stage postconviction proceedings, defendant must allege that it is arguable that: (1) counsel's performance "fell below an objective standard of reasonableness;" and (2) defendant was prejudiced by counsel's deficient performance. *Hodges,* 234 Ill. 2d at 17 (citing *Strickland v. Washington,* 466 U.S. 668, 687-88 (1984)). During first stage proceedings, we generally do not consider trial strategy-related arguments. *Tate*, 2012 IL 112214, ¶ 21-22. The failure to satisfy either prong will defeat an ineffective assistance claim. *People v. Enis,* 194 Ill. 2d 361, 377 (2000). If we can dispose of defendant's ineffective assistance claim because he suffered no prejudice, we need not address whether his counsel's performance was objectively reasonable. *People v. Lacy,* 407 Ill. App. 3d 442, 457 (2011).

¶ 20 Defendant first contends he stated the gist of a constitutional claim of ineffectiveness where trial counsel failed to call mitigation witnesses at his sentencing hearing. As detailed

above, defendant attached various statements from family members and neighbors as mitigation evidence.

¶ 21 To succeed on a claim of ineffective assistance of counsel during sentencing, a defendant must show that counsel's performance fell below minimal professional standards and that a reasonable probability exists that the defendant's sentence was affected. *People v. Sharp*, 2015 IL App (1st) 130438, ¶ 122.

¶ 22 Here, defendant contends that his petition alleges trial counsel knew about "three character witness[es] that wanted to testify on his behalf at sentencing" but failed to call them. He further contends that he provided six other statements from potential character witnesses, but he does not contend that counsel knew of those potential witnesses. Counsel cannot be deemed ineffective for failing to call character witnesses that he did not know existed. *People v. Morgan*, 2015 IL App (1st) 131938, ¶ 77 (noting that, " '[e]ffective counsel is not required to be clairvoyant.' ") (quoting *People v. Vasser*, 331 Ill. App. 3d 675, 685 (2002)).

¶ 23 However, even taking as true defendant's allegation regarding counsel's knowledge of three of the character witnesses, we find that defendant cannot demonstrate prejudice as a result of the failure to call those witnesses. In the context of a sentencing hearing, prejudice must be assessed based on the totality of the evidence, including both potential evidence in mitigation and the evidence in aggravation. *People v. Simon,* 2014 IL App (1st) 130567, ¶ 72.

¶ 24 Here, the record demonstrates that trial counsel in mitigation emphasized defendant's "extraordinary work record;" the PSI, which contained substantial mitigation evidence concerning defendant's work and educational history; and that he supports his children. In aggravation, the State highlighted defendant's prior conviction for driving under the influence, as

well as the fact that defendant was a "major player in this case," which involved 112.3 grams of cocaine. Given the substantial mitigating evidence already before the court, and the large quantity of narcotics, which the trial court considered in imposing sentence, we cannot say that the testimony of the three proposed character witnesses would have arguably altered the outcome of the sentencing proceeding. Thus, defendant has failed to demonstrate the gist of a constitutional claim of ineffective assistance of trial counsel for failing to call three witnesses at sentencing.

¶ 25 Defendant next argues that he stated an arguably meritorious claim of ineffective assistance of counsel where appellate counsel failed to include his sentencing transcript in the record on appeal, thereby forfeiting review of his excessive sentence claim.

¶ 26 The right to effective assistance of counsel applies to counsel on a direct appeal as of right. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). In assessing claims of ineffective assistance of appellate counsel, we use the same test used in assessing claims of ineffective assistance of trial counsel detailed above and set forth in *Strickland*. *Enis,* 194 Ill. 2d at 377.

¶ 27 We can think of no legitimate reason for appellate counsel's failure to include in the record the sentencing transcript, given that counsel raised a sentencing issue on appeal. However, because we now have the benefit of the sentencing transcript, the record demonstrates that defendant's claim of ineffective assistance fails under the prejudice prong of *Strickland*. Defendant has failed to make an arguable claim that the outcome of his direct appeal would have been different had the sentencing transcript been included.

¶ 28 We accord great deference to a trial court's sentence and will not reverse it absent an abuse of discretion. *People v. Butler*, 2013 IL App (1st) 120923, ¶ 30. As we noted in

defendant's direct appeal, his 14-year sentence falls on the lower end of the statutory range of 9 to 40 years (720 ILCS 570/401(a)(2)(B) (West 2010)), and is therefore presumed proper, unless it is manifestly disproportionate to the nature of the offense. See *People v. Burton*, 2015 IL App (1st) 131600, ¶ 36.

¶ 29 Here, the sentencing transcript reveals that, in determining defendant's sentence, the court properly considered the PSI, arguments in aggravation and mitigation, which included references to defendant's consistent work history and his children, and the large quantity of cocaine recovered. See *People v. Hernandez*, 319 Ill. App. 3d 520, 529 (2001) (In determining an appropriate sentence, the trial court considers such factors as "a defendant's history, character, and rehabilitative potential, along with the seriousness of the offense, the need to protect society, and the need for deterrence and punishment."); see also *People v. Babiarz*, 271 Ill. App. 3d 153, 164 (1995) ("Where the sentencing court examines a presentence report, it is presumed that the court considered the defendant's potential for rehabilitation."). Based on this, we cannot say that the trial court abused its discretion in imposing a 14-year sentence. Accordingly, there would have been no basis to disturb defendant's sentence on direct appeal. *People v. Burke*, 164 Ill. App. 3d 889, 902 (1987) (noting that, where the trial court properly considered relevant sentencing factors, it is not the function of a reviewing court to rebalance those factors on appeal). Thus, defendant has suffered no arguable prejudice from counsel's failure to attach his sentencing transcript in the record on appeal, and has failed to set forth the gist of a constitutional claim.

¶ 30 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 31 Affirmed.