2018 IL App (1st) 152416-U

SIXTH DIVISION
OCTOBER 26, 2018

No. 1-15-2416



IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 10 CR 19132 |
| | ) | |
| ANTHONY BROWN, | ) | Honorable |
| | ) | James B. Linn, |
| Defendant-Appellant. | ) | Judge Presiding. |

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Delort and Justice Harris concurred in the judgment.

**ORDER**

¶ 1 *Held*: The trial court's summary dismissal of defendant's *pro se* postconviction petition is affirmed, as his claim of ineffective assistance of trial counsel was decided on direct appeal and is thus barred by *res judicata*.

¶ 2 Defendant Anthony Brown appeals from the trial court's summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*.) (West 2014)). Defendant contends that his postconviction petition stated an arguable claim that his trial counsel was ineffective, based upon on counsel's failure to impeach the police officers'

testimony with a Chicago Police Department "event query" document that, he claims, contradicts the officers' testimony as to the events surrounding his arrest. For the following reasons, we affirm the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 This appeal arises from defendant's 2011 conviction for possession of a controlled substance (heroin) with intent to deliver (720 ILCS 570/401(c)(1) (West 2010)).

¶ 5 At defendant's jury trial[1], Chicago police officer Daniel Honda testified that, on September 30, 2010, at 6:30 p.m., he received an anonymous complaint of individuals selling narcotics below the train tracks on West 21st Street. Officer Honda and his partner, Officer Thomas Beyna, went to that location. Officer Honda set up surveillance in a nearby alley at about 6:30 p.m., from which location he observed the defendant.

¶ 6 During Officer Honda's surveillance, an unknown individual approached defendant, had a conversation with defendant, and gave defendant an unknown amount of money. Defendant accepted the money, put it in his right sweater pocket, and walked to the side of a nearby garage. From beneath the siding of the garage, defendant retrieved a black plastic bag, removed an item from that bag, and replaced the bag beneath the siding of the garage. Defendant gave the item to the unknown individual, who accepted the item and left.

¶ 7 Within 10 minutes, a second unknown individual approached defendant in the alley, spoke with defendant, and gave defendant an unknown amount of money. Defendant placed the money into his right sweater pocket, walked back to the garage, and retrieved the same black

[1] A full recitation of the evidence presented at trial is contained in our order affirming defendant's conviction on direct appeal. *People v. Brown*, 2014 IL App (1st) 112604-U. In this order, we only summarize the facts relevant to this appeal.

plastic bag. Defendant took an item from the bag before replacing the bag in the siding of the garage. He then gave the item to the individual, who accepted it and left. Based on his experience, Officer Honda believed that defendant had engaged in narcotics transactions.

¶ 8 Officer Honda contacted other officers, and four officers detained defendant in the alley. Officer Honda directed Officer Frank Sarabia to the side of the garage, from which Officer Sarabia recovered one black plastic bag. That bag contained 48 clear plastic ziplock bags, each of which contained two capsules of suspect heroin.

¶ 9 Officer Sarabia testified that, on September 30, 2010, at 6:45 p.m., he and his partner, Officer Todd Olsen, assisted others officers in detaining defendant. Officer Honda directed him to the siding of a nearby garage, from which he recovered a black plastic bag containing 48 clear ziplock bags, each of which contained two capsules of suspect heroin. Chicago police officer Todd Olsen testified that he accepted these items from Officer Sarabia and inventoried them. Officer Olsen also recovered $198 from defendant's right sweater pocket. Paula B. Szum, an expert in the field of forensic chemistry, testified that powder from the recovered capsules tested positive for a substance containing heroin.

¶ 10 The jury found defendant guilty of possession of a controlled substance with intent to deliver. The court denied defendant's motion for a new trial.

¶ 11 At defendant's sentencing hearing, defendant presented a written *pro se* motion alleging that his trial counsel was ineffective. Upon receipt of that motion, the trial court conducted a hearing pursuant to *People v. Krankel*, 102 Ill. 2d 181, 189 (1984). The defendant's motion alleged, *inter alia*, that trial counsel did not attempt to call an individual named Harold Wallace as a defense witness, and that his trial counsel failed to present evidence of the Chicago Police

Department 911 "event query" report, which would have contradicted the police officers' testimony.

¶ 12 During the hearing, defendant told the court:

> "Harold Wallace, [who] lived in the back of my house, which proved the police never had me under surveillance. They came and held me for four hours until they found some drugs and put them in my possession and said I was the one selling it, but in the 911 Query Event it said they arrested me at 1645 and they was on their way to central lockup at 7:45, but on the 911—."

At that point, the court asked defendant what Wallace's testimony would have been, had he testified. Later in the hearing, defendant's trial counsel told the trial court that he attempted to contact Wallace, but that Wallace "did not cooperate, did not return calls."

¶ 13 Subsequently at the hearing, defendant told the court that "this whole incident involved around the police's allegations against me based on the fact that they found drugs, but everything else that they stated in that police report and that they testified about was fabricated." The court, defense counsel, and defendant then engaged in the following exchange regarding the event query:[2]

> "THE COURT: Did [defendant] testify at trial?
>
> [DEFENSE COUNSEL]: No he chose not to. He was admonished.

[2] Notably, as conceded by defendant's appellate briefing, the actual event query document was not attached to his *pro se* motion claiming ineffective assistance, and the event query was not otherwise filed in the trial court.

DEFENDANT: Based on the fact that [defense counsel] had asked to introduce the 911 Query, which is the chronological order of the procedures in which police are suppose[d] to take when they are on a call, which he never used, period.

THE COURT: This was not a 911 situation. This was surveillance. The police were watching activity. This didn't start with a 911.

[DEFENSE COUNSEL]: No, in fact — the 911 Query that I have —

DEFENDANT: I have it right here.

THE COURT: They are already watching the area.

DEFENDANT: Here is the Query, your Honor. There was a call. There was a call, and they described the people they were looking for who were selling the drugs."

The court denied defendant's *pro se* motion, stating that it did not find any fault with defense counsel's work or that defendant's counsel was ineffective. The court sentenced defendant to nine and one-half years in prison.

¶ 14 On direct appeal, defendant argued, *inter alia*, that the trial court failed to conduct an adequate inquiry into defendant's *pro se* ineffective assistance of counsel claims under *Krankel*, and erred when it failed to appoint new counsel. *People v. Brown*, 2014 IL App (1st) 112604-U, ¶ 34. Defendant argued that his trial counsel was ineffective because he "fail[ed] to subpoena witnesses who would testify that the officers put the drugs in [defendant's] possession" and that his trial counsel "failed to present any evidence of a 9-1-1 event query, which could have shown the length of time between his arrest and when he was jailed." *Id.*

¶ 15 In our order affirming the conviction, we found "nothing in the record to show that the trial court erred in the *Krankel* hearing." *Id.* ¶ 38. We stated:

> "Regarding the 9-1-1 issue, the trial court explained to Brown that the case at bar was 'not a 9-1-1 situation. This was a surveillance [situation.]' As such, the trial court explained that Brown's complaint of defense counsel's decision not to use the '9-1-1 query' at trial was irrelevant. The trial court found Brown's allegation of ineffective assistance of counsel to be baseless.
>
> We do not find any error in the trial court's findings following the *Krankel* hearing. As such, this court will not remand this case for further inquiry because Brown's claims lack merit. Given the facts and circumstances, we hold that the trial court conducted an adequate inquiry into all of [defendant's] allegations and properly concluded that appointment of new counsel based on [defendant's] allegation of ineffective assistance of counsel, was unwarranted." *Id*. ¶¶ 38-39.

We thus affirmed the trial court's judgment but ordered correction of the mittimus to reflect the correct presentence custody credit. *Id*. ¶ 43.

¶ 16 In May 2015, defendant filed a *pro se* postconviction petition. He alleges, as relevant to this appeal, that trial counsel was ineffective because he failed to introduce the event query to impeach the police officers' testimony, and that trial counsel failed to call an expert witness to testify about the chronology of the event query. According to defendant's petition, he was detained by Officer Honda and another officer in the alley at 6:45 p.m. He claims that he was placed in a detective's car while the officers searched the alley for approximately four hours,

before Officer Sarabia said he found narcotics "from under the siding of the garage." Defendant asserts that the event query supports his version of the incident, that it is inconsistent with the arrest report, and that it could have impeached the officers' testimony. Defendant's petition attaches a letter he wrote to his trial counsel dated June 20, 2011, which discussed, *inter alia*, his belief that the event query was inconsistent with the arrest report. The petition also attaches a document entitled "Chicago Police Department Event Query," which, under the heading "Event Chronology," includes a chart showing dates and times and, for each date and time entry, additional columns labeled "Activity," "Wkstn," "Person" and "Text."

¶ 17 On June 15, 2015, the trial court summarily dismissed defendant's postconviction petition, finding that it was without merit. The trial court noted the defendant's claim that his "lawyers could have used 911 logs because it shows that somebody made a call to the police. That may also have happened, but the fact is that there's nothing that his lawyers did in this case or did not do in this case that caused his conviction." The trial court also remarked: "I don't find that his lawyer cross-examining in a different way is going to change the fact that the police saw what they saw ***." The trial court also stated that "this was all dealt with at the *Krankel* hearing as well *** and his conviction was confirmed." Defendant filed a timely notice of appeal, affording us jurisdiction.

¶ 18 ANALYSIS

¶ 19 On appeal, defendant contends that the trial court erred in summarily dismissing his postconviction petition, because it stated an arguable claim of ineffective assistance of counsel, based on his trial counsel's failure to impeach the police officers' testimony with the event query. Defendant argues that his conviction rested exclusively on the officers' credibility, and

that the event query directly contradicts their testimony regarding the timeline of their surveillance, defendant's detention, the discovery of the drugs, and defendant's arrest. Specifically, defendant contends that the event query shows that the police received a phone call at 7:39 p.m., not 6:30 p.m. as Officer Honda testified, and that the event query shows that Officer Honda did not acknowledge the call until 8:29 p.m. Defendant also asserts that the event query shows that at 10:41 p.m., a dispatcher sent an "RD" number—which would "presumably" be issued only after an arrest, thus contradicting the officers' testimony that defendant was arrested around 6:45 p.m. Defendant asserts that it is at least arguable that he was prejudiced by his trial counsel's failure to refer to the event query to impeach the officers' testimony. Thus, defendant requests that we reverse the dismissal of his petition and remand for further postconviction proceedings.

¶ 20 The State responds that defendant "waived" his ineffective assistance of counsel claim based on the event query, because he could have raised the issue on direct appeal. The State alternatively argues that this ineffective assistance claim was previously decided on direct appeal, and thus is barred by *res judicata*. Aside from those procedural arguments, the State alternatively contends that defendant cannot demonstrate ineffective assistance because he cannot show that he was prejudiced by his trial counsel's failure to refer to the event query.

¶ 21 Under the Post-Conviction Hearing Act, a defendant may collaterally attack a conviction by asserting that there was a substantial deprivation of his or her constitutional rights. *People v. Simmons*, 388 Ill. App. 3d 599, 605 (2009); 725 ILCS 5/122-1 *et seq*. (West 2014). The purpose of postconviction proceedings is to allow inquiry into constitutional issues relating to a

conviction or sentence that were not, and could not have been, determined on direct appeal. *People v. Barrow*, 195 Ill. 2d 506, 519 (2001).

¶ 22 "In a noncapital case, a postconviction proceeding contains three stages. At the first stage, the circuit court must independently review the petition, talking the allegations as true, and determine whether the petition is frivolous or is patently without merit. [Citations.] 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. [Citation.]" (Internal quotation marks omitted.) *People v. Tate*, 2012 IL 112214, ¶ 9. The summary dismissal of a postconviction petition is reviewed *de novo*." *Id.* ¶ 10.

¶ 23 "In an initial postconviction proceeding, the common law doctrines of *res judicata* and waiver operate to bar the raising of claims that were or could have been adjudicated on direct appeal." *People v. Blair*, 215 Ill. 2d 427, 443 (2005) (recognizing that "courts often use the terms 'forfeit,' 'waive,' and 'procedural default' interchangeably" and that "we *** use the term 'forfeit' to mean issues that could have been raised, but were not, and are therefore barred").

Thus, "trial courts may summarily dismiss postconviction petitions based on both *res judicata* and waiver." *Id.* at 442. "*Res judicata* bars consideration of issues that were raised and decided on direct appeal, while issues that could have been presented on direct appeal[,] but were not[,] are considered waived." *People v. Gale*, 376 Ill. App. 3d 344, 349 (2007).

¶ 24 In this case, the crux of defendant's postconviction petition—that his trial counsel was ineffective for failing to rely upon the event query—was raised and decided on direct appeal. Thus, we find that *res judicata* applies.

¶ 25 In defendant's brief on direct appeal,[3] defendant argued, *inter alia*, that (1) his trial counsel was ineffective in failing to use the event query to undermine the police officers' testimony and to corroborate his claim that he was detained for several hours, and (2) that the trial court failed to conduct an adequate inquiry into his *pro se* ineffective assistance of counsel claims. *Brown*, 2014 IL App (1st) 112604-U, ¶ 34. In our order on direct appeal, we specifically noted the trial court's finding that "defense counsel's decision not to use the [event query] at trial was irrelevant" and that the "trial court found [defendant's] allegations of ineffective assistance of counsel to be baseless." *Id.* ¶ 38. We then stated: "We do not find any error in the trial court's finding" and determined that we "will not remand this case for further inquiry because [defendant's] claims lack merit." *Id.* ¶ 39.

¶ 26 Because we already decided that defendant's ineffective assistance claims lacked merit and the trial court did not err in finding that defendant's ineffective assistance of counsel claim was baseless, we find that defendant's claim is barred by *res judicata*. See *People v. Johnson*, 2016 IL App (5th) 130554, ¶¶ 31-32 (finding that the defendant's postconviction ineffective assistance claim was barred by *res judicata*, to the extent that defendant's allegations had already been considered by the trial court during a *Krankel* hearing, and also by the appellate court on direct appeal).

¶ 27 We note defendant's argument that *res judicata* should not apply because the event query document attached to his petition was not a part of the record on direct appeal, and thus was not considered by our court in rendering our prior order. In response to this point, the State

[3] We may take judicial notice of briefs filed in another case. *People v. Mosley*, 2015 IL 115872, ¶ 16, n.6.

emphasizes that defendant already possessed the event query document at the time of the *Krankel* hearing before the trial court, but that "defendant never sought to supplement the appellate record with the event query" on direct appeal. The State thus argues "defendant is procedurally barred from using the 911 event query to argue that he received *** ineffective assistance of counsel."

¶ 28 Defendant's reply brief acknowledges that he was in possession of the event query during the *Krankel* hearing in the trial court, but he asserts that it could not have been made part of the record on direct appeal, "as it was not filed or submitted into evidence [in the trial court] and was not viewed by the judge or State."[4] He avers that, "despite [his] attempt to show it to the judge" during the *Krankel* hearing, "the trial judge dismissed [defendant's] motion immediately after [defendant] said he possessed the event query *** and pointedly did not discuss the event query." Defendant thus reasons that the event query could not have been made part of the prior record on appeal, and so he did not waive his post-conviction claim based on the event query.

¶ 29 Defendant's argument is unpersuasive. First, he does not suggest how his ineffective assistance claim on direct appeal would have been substantially different, even had the event query been included in the record on appeal. On direct appeal, even without the event query in the record, defendant argued (as he now does in his postconviction petition), that his trial counsel was ineffective for not relying on the event query to contradict the officers' testimony regarding the timeline of events surrounding his arrest. A "petitioner may not avoid the bar of *res judicata* simply by rephrasing *** issues previously addressed on direct appeal." *People v. Simpson*, 204

[4] Defendant's reply brief acknowledges: "Although [defendant] ostensibly brought the event query to court, it was not attached to his file-stamped *Krankel* petition; it was not separately filed; and it was not presented in court as an attachment, exhibit or other type of evidence." Defendant does not offer an explanation as to why he did not attempt to file that document in the trial court.

Ill. 2d 536, 559 (2001) (finding that the defendant's claim was barred by *res judicata* even though the defendant attached new affidavits to support his postconviction claim). We thus find that application of *res judicata* is not precluded by the absence of the event query in the record on direct appeal.

¶ 30 Moreover, the defendant's argument concedes that he had the event query document in his possession when he filed his post-trial motion, and claims that the trial court rejected his attempt to submit it during the *Krankel* hearing. Thus, on direct appeal, defendant could have asserted that the trial court erred in rejecting his alleged attempt to submit that document to the trial court. To the extent he did not assert that challenge on direct appeal, that argument is forfeited for purposes of his postconviction petition. See *Johnson*, 2016 IL App (5th) 130554, ¶ 32 (explaining that postconviction ineffective assistance arguments that "could have been raised on direct appeal" are forfeited).

¶ 31 For the foregoing reasons, we conclude that *res judicata* bars defendant's postconviction claim that his trial counsel was ineffective. Accordingly, the circuit court did not err when it summarily dismissed defendant's postconviction petition.

¶ 32 For the reasons discussed above, we affirm the judgment of the circuit court of Cook County.

¶ 33 Affirmed.