2018 IL App (2d) 160243-U
Nos. 2-16-0243 & 2-16-0347, cons.
Order filed December 13, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Lee County.
Plaintiff-Appellee,	)	
	)	Nos. 01-CF-166
v.	)	01-CF-181
	)	
KENDALL U. DAVIS,	)	Honorable
	)	Ronald M. Jacobson,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Birkett and Justice Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: Sufficient evidence was presented to corroborate the defendant's confession under the *corpus delicti* rule. Also, the trial court did not err in dismissing his postconviction petition claiming ineffective assistance of counsel on a sentencing issue.

¶ 2 In January 2003, a jury found the defendant, Kendall U. Davis, guilty of two counts of home invasion, two counts of unlawful use of weapon, aggravated battery, possession of a controlled substance (cocaine), possession of that substance with intent to deliver, possession of cannabis, possession of cannabis with intent to deliver, and criminal drug conspiracy. Davis was present when his jury trial began but he did not return to court when the jury returned its verdict,

and he was also absent from the sentencing hearing. His sentence included, among other things, 20 years' imprisonment and a street value fine of $9000 pursuant to section 5-9-1.1(a) of the Unified Code of Corrections (730 ILCS 5/5-9-1.1(a) (West 2002)). Davis was arrested in 2007.

¶ 3 Davis filed a motion for a new trial pursuant to section 115-4.1(e) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-4.1(e) (West 2014)), as permitted for those who are convicted *in absentia*. He also filed a *pro se* postconviction petition pursuant to section 122-1 of the Code (725 ILCS 5/122-1 (West 2016)). The trial court denied the section 115-4.1 motion and dismissed the postconviction petition as frivolous and patently without merit. Davis filed two appeals from those orders. We ordered the appeals consolidated for briefing and disposition. We now affirm both orders.

¶ 4 I. BACKGROUND

¶ 5 The following facts are drawn from the evidence presented at trial. On June 23, 2001, Richard Burgess found a cell phone box in a ditch on his property. The box contained several bags containing a grassy material and other bags containing a white, rock-like substance. Burgess turned the box over to the Lee County Sheriff's office. There was a total of 315.2 grams of the grassy material and 74.3 grams of the white, rock-like substance. The content of some of the bags was later tested by a forensic chemist. The chemist tested the contents of bags containing 34 grams of the grassy material and found it to be cannabis. He tested 15.4 grams of the white, rock-like substance, which tested positive for cocaine. He did not test the content of the remaining bags, and testified that he had no opinion about whether the remaining grassy material was cannabis.

¶ 6 Dionte Scott testified that, on June 28, 2001, he was at an apartment at 223 East Seventh Street in Dixon with his friend Eric Gray. He saw Davis arrive and get out of his car, carrying an

aluminum baseball bat. Davis came up the front steps and kicked the front door in. Scott and Gray fled out the back door. Outside, Scott ran left and Gray ran right. Scott saw Davis come out of the back door and follow Gray around the corner of the building. Scott could not see what happened after that and he did not see Davis swing the bat that day. Scott called the police, and Davis left.

¶ 7 About three or four hours later, Sergeant Clay Whelan of the Dixon police department received a phone call from Davis, asking if Davis was wanted on an arrest warrant for home invasion. Davis told Whelan that he had been chasing Scott and Gray when they ran into an apartment on Seventh Street. Davis said that the first man to enter locked the other man out, and the other man then kicked the door in and entered. Davis said he approached the front door but did not cross the threshold. He saw the two men run out the back door of the apartment. He then went around the outside of the building and chased them, because they had taken money from him.

¶ 8 Scott testified that, the next day (June 29), he, his girlfriend, and Gray were at the apartment when Davis arrived again, this time with three other men. Davis again had a full-size aluminum bat and the other three had small wooden bats. Davis and another man went to the front door while the other two men went to the back door. Davis kicked open the front door and the four men surrounded Scott in the kitchen. Davis hit Scott in the face with his bat and then the others began hitting Scott as well. Scott ran out the back door.

¶ 9 On July 12, Davis again called the Dixon police department. This time, he spoke to Sergeant Danny Langloss. On this call, Davis admitted that on June 28 he kicked the door open and entered the apartment. When Scott and Gray ran out the back door, Davis left through the front door and chased them. He swung the bat at one of them but did not hit anyone.

¶ 10 On July 20, Davis was arrested. He gave a recorded statement, in which he explained that he had loaned Gray $2500, which Gray intended to use to buy drugs to sell. Gray was to repay him from the proceeds. Davis gave Gray a cell phone box to store the drugs in. After Gray bought the drugs, Davis saw them in the box: the box was full of bags of marijuana and cocaine. Davis estimated that there was more than a pound of marijuana and four or five ounces of cocaine. Asked how much Gray had, Davis replied that he wasn't sure, but "by my knowledge of street knowledge," the $2500 Gray used to buy drugs would have yielded about $8000-$10,000 worth of drugs. Gray later stated that the street value of the drugs he saw in the box was $8000 to $9000.

¶ 11 In his statement to the police, Davis said that Gray, who had hidden the box, later told him that the box was missing. Davis told Gray that Gray still owed him the $2500, and that was why he went to the apartment and chased Gray with the bat. He admitted swinging the bat at Gray. He did not intend to hurt or kill Gray, only scare him into repaying Davis.

¶ 12 Langloss testified that the street value of cocaine was between $150 and $200 per gram, and 70 grams would have a street value of about $14,000. He did not testify about the street value of the marijuana.

¶ 13 As noted, Davis was not present when the jury returned its verdict, and he was not present for the sentencing hearing, either. At the sentencing hearing, the State argued that the street value fine should be $9000. The defense attorney did not object to or even address the street value fine. The trial court imposed a street value fine of $9000, in addition to 20 years' imprisonment and other penalties.

¶ 14 Davis was arrested in 2007 and began serving his time. In February 2015, he filed a motion for a new trial pursuant to section 115-4.1(e) of the Code. On March 16, 2016, the trial

court denied his motion, and Davis filed a timely notice of appeal. That appeal was docketed as no. 2-16-0243. Meanwhile, in February 2016, Davis filed a *pro se* postconviction petition pursuant to section 122-1 of the Code, arguing that his attorney was ineffective by failing to challenge the amount of the street value fine. On April 20, 2016, the trial court dismissed the petition as frivolous and patently without merit, and Davis appealed that order as well. This second appeal was docketed as 2-16-0347. The two appeals were consolidated for briefing and disposition.

¶ 15 II. ANALYSIS

¶ 16 On appeal, Davis argues that (1) his conviction of home invasion that was based on his act of swinging a bat at Eric Gray must be reversed under the *corpus delicti* rule because there was no independent evidence corroborating his confession to that offense; and (2) the dismissal of his postconviction petition should be reversed. Before we address those issues, however, we briefly consider our jurisdiction over these appeals.

¶ 17 A. Jurisdiction

¶ 18 The State filed a motion to dismiss these appeals, arguing that we did not have jurisdiction over them because of errors in the original *pro se* notices of appeal as well as the later amended notices of appeal filed by appointed counsel. The State also argued that, even leaving aside the defects in the notices of appeal, we could not reach any substantive issues regarding Davis's trial in our review of the denial of his section 115-4.1 motion, but could only review the propriety of the trial court's finding that Davis did not show that he was not willfully absent from his trial and sentencing. Davis filed a response to these arguments, and the parties also devoted much of their briefs to the issue of jurisdiction.

¶ 19 We found the State's arguments persuasive and granted its motion to dismiss the appeals. Davis appealed to the supreme court, and it was receptive to his arguments. On August 21, 2018, the supreme court issued a supervisory order vacating our previous dismissal and ordering the reinstatement of the appeals. As any further consideration by us of jurisdictional issues is foreclosed by the supervisory order, we turn to the other issues raised in the appeals.

¶ 20 B. *Corpus Delicti*

¶ 21 Section 115-4.1(g) permits a defendant convicted *in absentia* to appeal the denial of his or her motion seeking to set aside the conviction and for a new trial. It further provides that such an appeal "may include a request for review of the judgment and sentence not vacated by the trial court," thereby allowing review of the underlying conviction. 725 ILCS 5/115-4.1(g) (West 2014). Davis's sole argument in his appeal from the denial of his section 115-4.1 motion is that, because of the *corpus delicti* rule, there was insufficient evidence to support his conviction on the count charging him with home invasion through his act of swinging a bat at Gray.

¶ 22 As our supreme court has explained,

> "The *corpus delicti* of an offense is simply the commission of a crime. Along with the identity of the person who committed the offense, it is one of two propositions the State must prove beyond a reasonable doubt to obtain a valid conviction. In general, the *corpus delicti* cannot be proven by a defendant's admission, confession, or out-of-court statement alone. When a defendant's confession is part of the *corpus delicti* proof, the State must also provide independent corroborating evidence." *People v. Lara*, 2012 IL 112370, ¶ 17 (citing *People v. Sargent*, 239 Ill. 2d 166, 183 (2010)).

The independent evidence must only be sufficient to corroborate the defendant's confession and need not rise to the level of independently proving the commission of the crime beyond a

reasonable doubt. "To avoid running afoul of the *corpus delicti* rule, the independent evidence need only *tend to show* the commission of a crime." (Emphasis in original.) *Id.* ¶ 18. " 'The true rule is that if there is evidence of corroborating circumstances which *tend to prove the corpus delicti* and *correspond with the circumstances related in the confession*, both * * * may be considered in determining whether the *corpus delicti* is sufficiently proved in a given case.' " *Id.* ¶ 32 (quoting *People v. Perfecto*, 26 Ill. 2d 228, 229 (1962) (emphasis added in *Lara*)).

¶ 23 Davis argues that his conviction of home invasion that was based on his alleged assault against Gray on June 28, 2001, violates the *corpus delicti* rule and cannot stand because the only evidence supporting that conviction was his confession. He points out that the offense of home invasion requires the State to prove that he threatened someone within another person's dwelling with the imminent use of force while armed with a dangerous weapon. See 720 ILCS 5/19-6(a)(1) (West 2000). Further, the indictment alleged specifically that Davis committed this offense by swinging an aluminum bat at Gray. However, Scott never testified that he saw Davis swing his bat at Gray, and indeed Scott testified that Gray and Davis ran around the corner of the building after coming out of the back door and Scott could not see them after that. Gray did not testify at trial, and thus there was no independent corroboration that Davis swung the bat at him.

¶ 24 The State argues that there was ample independent evidence supporting the conviction. Scott testified that he saw Davis arrive, get a bat, kick in the front door of the apartment, and chase Scott and Gray through the apartment and out the back door while holding the bat. The State contends that, regardless of whether the indictment alleged the specific act of swinging the bat, it was only required to prove that Davis threatened someone with the imminent use of force while armed with a dangerous weapon, and the jury could reasonably have concluded that Davis's actions in chasing Gray while holding the bat met this requirement. The State also

argues that, even if it was required to show that Davis swung the bat at Gray, the independent evidence itself did not need to prove beyond a reasonable doubt that this specific action took place. Rather, under the *corpus delicti* rule as explained in *Perfecto* and reaffirmed in *Lara*, the independent evidence must only "correspond with the circumstances related in the confession" and "tend to prove" the commission of the charged offense. (Emphasis removed.) *Lara*, 2012 IL 112370, ¶ 32 (quoting *Perfecto*, 26 Ill. 2d at 229).

¶ 25 Here, Scott's testimony about Davis's forcible entry into the apartment while armed with a bat and his chasing of Scott and Gray corresponds with the circumstances related in Davis's recorded statement to the police, and it tends to corroborate Davis's admission that he swung the bat at Gray. No more is needed. We therefore affirm the trial court's denial of Davis's section 115-4.1 motion for a new trial.

¶ 26 C. Street Value Fine

¶ 27 Davis's second appeal stems from the trial court's dismissal of his postconviction petition. Although that petition raised several claims, on appeal Davis asserts error only as to the trial court's dismissal of his claim that his trial counsel was ineffective by failing to attack, at sentencing, the imposition of a street value fine in the amount of $9000. Davis acknowledges that some fine could be imposed, but he contends that the evidence did not adequately support the trial court's finding that the street value of the drugs he was convicted of possessing was $9000, and thus his counsel erred in not objecting to the amount of the fine.

¶ 28 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2014)) establishes a three-stage process for adjudicating a postconviction petition. *People v. Jones*, 213 Ill. 2d 498, 503 (2004). At the first stage, the trial court reviews the petition within 90 days of its filing to determine whether it is either frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2)

(West 2014). If the trial court determines that the petition is frivolous or patently without merit, it must dismiss the petition. *Id*. That is what the trial court here did.

¶ 29 Because most petitions at the first stage are drafted by defendants with little legal knowledge, the threshold for survival is low. *People v. Torres*, 228 Ill. 2d 382, 394 (2008). Only a limited amount of detail need be presented in a *pro se* petition, but the petition must clearly set forth how the petitioner's constitutional rights were violated. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009); see also 725 ILCS 5/122-2 (West 2014).

¶ 30 A *pro se* postconviction petition is frivolous or patently without merit when it has "no arguable basis either in law or in fact." *Hodges*, 234 Ill.2d at 16. "A petition has no basis in law when it is based on an 'indisputably meritless legal theory,' meaning that the legal theory is 'completely contradicted by the record.' " *People v. Carballido*, 2011 IL App (2d) 090340, ¶ 37 (quoting *Hodges*, 234 Ill. 2d at 16). "A petition has no basis in fact when it is based on 'fanciful factual allegation[s],' meaning that the factual allegations are 'fantastic or delusional.' " *Id*. (quoting *Hodges*, 234 Ill. 2d at 17). When considering whether to summarily dismiss a postconviction petition at the first stage, a court must take as true "all well-pleaded facts not positively rebutted by the original trial record." *Id*. at ¶ 40 (citing *People v. Coleman*, 183 Ill. 2d 366, 385 (1998)). A petition not dismissed as frivolous or patently without merit advances to the second stage. *Id*. at ¶ 37. A trial court's first-stage dismissal is reviewed *de novo*. *Id*.

¶ 31 When, as here, a postconviction petition argues that the defendant received ineffective assistance of counsel, there is a further standard that applies. Under *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant arguing ineffective assistance of counsel must show not only that his or her counsel's performance was deficient but that the defendant suffered prejudice as a result. *People v. Houston*, 226 Ill. 2d 135, 143 (2007). Under the two-prong *Strickland* test, "a

defendant must show that (1) his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant in that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different." *Houston*, 226 Ill. 2d at 144. Because a defendant must satisfy both prongs of the *Strickland* test, the failure to establish either is fatal to the claim. *Strickland*, 466 U.S. at 687.

¶ 32 Davis argues that his counsel's performance at the sentence hearing was deficient, and that if his counsel had properly objected to the amount of his street value fine, that amount would have been far lower. In support, Davis argues that there is at least some case law suggesting that courts should consider only the amount of drugs actually tested when imposing street value fines. See *People v. Sedrel*, 184 Ill. App. 3d 1078, 1082 (1989) (street value fine must be based only on tested drugs, not total material seized); *People v. Tyson*, 221 Ill. App. 3d 256, 259 (1991) (the street value of drugs must be based on evidence and cannot simply be pulled out of thin air). The forensic chemist here tested only 34 grams of the grassy material and 15.4 grams of the white, rock-like substance, which was determined to contain cocaine. Langloss testified that the street value of cocaine was $150-200 per gram, but there was no testimony about the value of marijuana. Further, the chemist testified that he had no opinion as to whether the remaining grassy material was marijuana. Accordingly, Davis argues that the evidence only supported a street value fine of $2310 to $3080, not $9000.

¶ 33 The State responds that the only viable case law to directly address the issue of whether untested drugs can be considered in setting the street value fine has held that they can be. See *People v. Nixon*, 278 Ill. App. 3d 453, 459 (1996) (concluding that *People v. Robinson*, 167 Ill. 2d 397 (1995) supports the imposition of penalties for untested drugs when there is evidence that

the untested material is the same as the tested substances); *People v. West*, 2017 IL App (3d) 130802, ¶ 28 (reaffirming *Nixon*'s holding). The State notes that the *Nixon* court specifically disavowed its earlier opinion in *Sedrel* because that decision (like *Tyson*) was issued prior to the supreme court's decision in *Robinson*. Davis counters that both *Nixon* and *West* are the product of the Third District appellate court and are not binding on us, and he argues that those cases were wrongly decided. Further, he argues that even if the *Nixon*/*Robinson* standard is applied, there was not enough evidence in the record regarding the untested material to permit the conclusion that it was the same as the tested material.

¶ 34 While we appreciate the points raised in Davis's arguments, we find that they are irrelevant in light of Davis's own admissions regarding the street value of the drugs at issue. In his statement to the police, Davis said that the drugs in the cell phone box had a street value of $8000-9000. On appeal, Davis argues that there was no evidence as to how he came up with this figure. However, Davis told the police that his estimate was based on his own "street knowledge." We note that the record contains evidence that Davis had several prior convictions for drug-related offenses, supporting Davis's claim of "street knowledge" regarding the street value of illegal drugs. Thus, we need not decide which case law we would follow: regardless, the street value fine imposed here was supported by the evidence. Davis's attorney was not ineffective by failing to object to the amount of the fine, because any objection would have been fruitless given the evidence. "Counsel cannot be considered ineffective for failing to make or pursue what would have been a meritless objection." *People v. Edwards*, 195 Ill. 2d 142, 165 (2001).

¶ 35 Further, we think it likely that the defense counsel's decision not to object to the amount was strategic, rather than an oversight. The evidence suggested that the street value of the drugs

was likely higher than the amount suggested by the State during the sentencing hearing, given Langloss's estimate that the cocaine alone was worth $14,000, and the total amount would have been even higher with the marijuana added in. Thus, defense counsel could well have reasoned that any objection would harm rather than benefit the defendant. There is a strong presumption that counsel's actions or inactions—such as the decision not to present certain arguments—constitute sound strategy. *People v. Perry*, 224 Ill. 2d 312, 341-42 (2007). To prove otherwise, a party must show that counsel's decision was so irrational and unreasonable that no reasonably effective attorney, facing like circumstances, would pursue such a strategy. *People v. Jones*, 2012 IL App (2d) 110346, ¶ 82. For all of these reasons, we affirm the trial court's first-stage dismissal of Davis's postconviction petition.

¶ 36 III. CONCLUSION

¶ 37 For the reasons stated, the orders entered by the circuit court of Lee County on March 16, 2016 (denying Davis's section 115-4.1 motion for a new trial), and on April 20, 2016 (dismissing his postconviction petition), are affirmed.

¶ 38 Affirmed.