

NOTICE

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FILED
March 27, 2018
Carla Bender
4th District Appellate
Court, IL

2018 IL App (4th) 150937-U

NO. 4-15-0937

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

| | | |
|--------------------------------------|---|------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from |
| Plaintiff-Appellee, |) | Circuit Court of |
| v. |) | Morgan County |
| DEMARCO D. WATTS, |) | No. 12CF88 |
| Defendant-Appellant. |) | |
| |) | Honorable |
| |) | John M. Madonia, |
| |) | Judge Presiding. |

JUSTICE HOLDER WHITE delivered the judgment of the court.
Presiding Justice Harris and Justice Turner concurred in the judgment.

ORDER

¶ 1 *Held:* We grant appellate counsel’s motion to withdraw and affirm the trial court’s dismissal of defendant’s *pro se* postconviction petition.

¶ 2 In August 2015, defendant, Demarco D. Watts, filed a *pro se* petition for postconviction relief, asserting claims of ineffective assistance of both trial and appellate counsel. In November 2015, the trial court summarily dismissed the *pro se* postconviction petition at the first stage of proceedings.

¶ 3 Defendant filed a notice of appeal. However, the office of the State Appellate Defender (OSAD) has filed a motion to withdraw, asserting no meritorious claims can be raised on appeal. For the following reasons, we grant OSAD’s motion to withdraw and affirm the trial court’s judgment.

¶ 4 I. BACKGROUND

¶ 5

A. Trial Court Proceedings

¶ 6 In June 2012, the State charged defendant—and three codefendants—with armed robbery (720 ILCS 5/18-2(a)(2) (West 2012)), alleging he took property from Chapin State Bank by using force or the threat of force when he entered the bank and demanded money while armed with a firearm. During the jury trial, the State presented multiple witnesses who identified defendant as brandishing a firearm during the bank robbery. Defendant and three codefendants then fled the scene in a vehicle and engaged in a high-speed pursuit with police. After crashing the vehicle, the vehicle’s occupants fled. Spoils from the robbery—including the “bait money” provided by the bank tellers—were recovered from the area around the getaway vehicle. Police recovered a silver revolver near the getaway vehicle and a black semiautomatic handgun inside the vehicle. Defendant was discovered hiding in a nearby garage.

¶ 7 When questioned, defendant admitted he and his codefendants intended to rob a drug dealer, and that a codefendant had firearms for that purpose. However, the robbery did not work out as planned, and the group was returning home to St. Louis, Missouri. Along the way, one of the codefendants asked defendant to stop at Chapin State Bank so she could ask for directions. According to defendant, he was unaware his codefendants planned to commit the robbery when the group entered the bank and he did not participate in the robbery. Afterward, he drove the codefendants away from the scene.

¶ 8 The jury found defendant guilty, and he was subsequently sentenced to 26 years’ imprisonment.

¶ 9

B. Direct Appeal

¶ 10 On direct appeal, defendant asserted (1) his sixth-amendment right to confront witnesses was violated when the trial court allowed a sheriff’s deputy to testify about defendant’s

conversation with another deputy, and (2) certain fines and fees were improperly imposed. *People v. Watts*, 2015 IL App (4th) 130314-U, ¶ 2. We affirmed in part and vacated in part, concluding the officer's testimony did not constitute reversible error under the plain-error doctrine, but holding certain fines and fees were improperly imposed. *Id.* ¶¶ 46, 51.

¶ 11 C. Postconviction Proceedings

¶ 12 In August 2015, defendant filed a *pro se* petition for postconviction relief. Therein, he alleged trial counsel provided ineffective assistance of counsel by failing to challenge (1) the racial composition of the jury, which he alleged was entirely Caucasian; and (2) the admissibility of two firearms during the trial. He then alleged appellate counsel provided ineffective assistance for failing to raise these issues on direct appeal.

¶ 13 In November 2015, the trial court entered an order summarily dismissing defendant's postconviction petition as frivolous and patently without merit. In a written memorandum, the court noted the racial composition of the jury pool was a matter outside of the record, and defendant provided no affidavits or other evidence in his petition to show the jury was entirely Caucasian. Procedural deficiencies aside, the court also noted both parties had the ability to question the prospective jurors and assess any prejudices or biases. Defendant's allegation that the jury was entirely Caucasian, standing alone, was insufficient to successfully challenge the jury's composition. The court also noted, had defendant challenged the jury's composition, it would have rejected the claim because there was no evidence that the system for choosing a jury pool had been manipulated or improperly administered.

¶ 14 As to defendant's argument regarding the admission of the two firearms, the trial court found the argument was contradicted by the record. According to the court, the State tied the firearms to the robbery and defendant, who was identified as one of the individuals who

brandished a firearm during the robbery. The record further demonstrated that the State established chain of custody for the firearms. Moreover, the court noted it would have overruled trial counsel's objection if one had been made. Thus, trial counsel did not provide ineffective assistance of counsel by failing to assert a meritless argument.

¶ 15 Because defendant could not establish his trial counsel provided ineffective assistance of counsel, the trial court found defendant could not demonstrate appellate counsel provided ineffective assistance of counsel by failing to raise meritless arguments related to the racial composition of the jury or the admissibility of the firearms.

¶ 16 C. Notice of Appeal

¶ 17 Defendant filed a timely notice of appeal and the trial court appointed OSAD to represent defendant. In September 2017, OSAD filed a motion for leave to withdraw, attaching to its motion a brief conforming to the requirements of *Pennsylvania v. Finley*, 481 U.S. 551 (1987). This court allowed defendant leave to file additional points and authorities by October 25, 2017. Defendant has not done so. After examining the record, we grant OSAD's motion to withdraw and affirm the trial court's dismissal of defendant's *pro se* postconviction petition.

¶ 18 II. ANALYSIS

¶ 19 OSAD argues no colorable argument can be made to support defendant's contention that the trial court erred in dismissing his amended petition for postconviction relief. Specifically, in its motion to withdraw, OSAD outlines the following claims for review: (1) whether the trial court followed the proper procedure in summarily dismissing defendant's claim; (2) trial counsel was ineffective for failing to object to the racial composition of the jury; (3) trial counsel was ineffective for failing to challenge the admission of two firearms during trial; and

(4) appellate counsel was ineffective for failing to raise on direct appeal those issues related to the jury's composition, the admissibility of the firearms, or the ineffectiveness of trial counsel.

¶ 20

A. Summary Dismissal

¶ 21

Under the Post-Conviction Hearing Act, an imprisoned defendant may assert the trial court proceedings resulted in a substantial denial of his constitutional rights. 725 ILCS 5/122-1(a)(1) (West 2012). Once a defendant files a petition for postconviction relief, the trial court may, during this first stage of proceedings, enter a dismissal order within 90 days if it finds the petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2012). The court must make this determination without any input from the State. *People v. Gaultney*, 174 Ill. 2d 410, 418, 675 N.E.2d 102, 106 (1996). Here, defendant filed his *pro se* postconviction petition on August 21, 2015, and the court summarily dismissed the petition without input from the State on November 10, 2015, within the 90-day limit. Thus, the trial court followed the proper procedures in summarily dismissing defendant's postconviction petition.

¶ 22

Upon review of the court's first-stage dismissal, we examine whether the defendant's petition sets forth the gist of a constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244, 757 N.E.2d 442, 445 (2001). "A claim completely contradicted by the record is an example of an indisputably meritless legal theory" appropriately dismissed at the first stage of postconviction proceedings. *People v. Brown*, 236 Ill. 2d 175, 185, 923 N.E.2d 748, 754 (2010). Our review is *de novo*. *People v. Collins*, 202 Ill. 2d 59, 66, 782 N.E.2d 195, 198 (2002).

¶ 23

B. Ineffective Assistance of Trial Counsel

¶ 24

OSAD asserts defendant can make no colorable claim of ineffective assistance of trial counsel as it relates to the racial composition of the jury or to the admissibility of the two firearms. To demonstrate ineffective assistance of counsel, defendant must show counsel's (1)

performance fell below an objective standard of reasonableness; and (2) deficient performance resulted in prejudice to the defendant such that, but for counsel’s errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). If a defendant fails to prove either prong of the *Strickland* test, his claim for ineffective assistance of counsel must fail. *People v. Sanchez*, 169 Ill. 2d 472, 487, 662 N.E.2d 1199, 1208 (1996).

¶ 25 Put in the context of postconviction proceedings, “a petition alleging ineffective assistance may not be summarily dismissed if (i) it is arguable that counsel’s performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced.” *People v. Hodges*, 234 Ill. 2d 1, 17, 912 N.E.2d 1204, 1212 (2009).

¶ 26 1. *Racial Composition of the Jury*

¶ 27 In his *pro se* postconviction petition, defendant argued trial counsel was ineffective for failing to challenge the racial composition of the jury. Specifically, defendant alleges the jury was entirely Caucasian, which deprived him—an African American—of the right to a jury of his peers. As the trial court noted, the record is silent regarding the racial composition of the jury. When filing a postconviction petition, “The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached.” 725 ILCS 5/122-2 (West 2014). “The failure to either attach the appropriate supporting material or explain its absence justifies the summary dismissal of a petition.” *People v. Reed*, 2014 IL App (1st) 122610, ¶ 40, 25 N.E.3d 10. As the trial court noted, the record does not include the racial composition of the jury, nor did defendant provide any affidavits, records, or other evidence to support his claim that the jury was entirely Caucasian or that the jury was racially unbalanced due to systematic exclusion of African-

American jurors. See *People v. Hollins*, 366 Ill. App. 3d 533, 538, 852 N.E.2d 414, 419 (2006). Moreover, defendant failed to justify the absence of such materials. Even if we were able to determine the jury was entirely Caucasian, “[t]here is no constitutional presumption of juror bias for or against members of any particular racial or ethnic groups.” (Internal quotation marks omitted.) *People v. Peeples*, 155 Ill. 2d 422, 460, 616 N.E.2d 294, 311 (1993). Other than presuming the Caucasian jury was biased against defendant because he is African American, defendant provides no support for his argument of bias. Instead, the record demonstrates the jury was closely questioned for any biases and prejudices by the trial court and the parties.

¶ 28 We therefore conclude the trial court properly found that defendant failed to state the gist of a claim on this issue.

¶ 29 *2. Admissibility of Firearms*

¶ 30 Defendant also alleged his trial counsel provided ineffective assistance of counsel by failing to object to the admissibility of two firearms during trial.

¶ 31 “The party seeking to introduce an object into evidence must lay an adequate foundation in one of two ways: (1) by a witness identifying the object; or (2) by a chain of possession.” *People v. Smith*, 2014 IL App (1st) 103436, ¶ 45, 16 N.E.3d 129. We first address the identification of the firearms. Multiple witnesses identified defendant as brandishing a firearm during the bank robbery. Defendant admitted he was present, even if he denied taking part in the robbery. Following a car chase with police, the vehicle’s occupants fled, and two firearms were recovered from the area around the getaway vehicle. A silver revolver was recovered near the getaway vehicle, and a black semiautomatic handgun was located in the vehicle. Defendant was discovered shortly thereafter hiding in a nearby garage, and he admitted to police that he and his codefendants had firearms in anticipation of committing an unrelated

robbery. By showing the connection between defendant and the firearms, the State laid a sufficient foundation for the admissibility of both firearms. Thus, the record contradicts defendant's argument.

¶ 32 Second, we examine defendant's argument that trial counsel should have challenged the chain of custody related to the firearms. "To establish an adequate chain of custody, the State must show that the police took reasonable protective measures to ensure that the piece of evidence is the same item that the police recovered." (Internal quotation marks omitted.) *Smith*, 2014 IL App (1st) 103436, ¶ 47. In establishing chain of custody, "[t]he State does not have to present testimony from every person in the chain of custody; rather, the State must simply show that it was unlikely that the evidence has been altered." (Internal quotation marks omitted.) *Id.* Any deficiencies in the chain of custody go to the weight of the evidence, not its admissibility. *People v. Alsup*, 241 Ill. 2d 266, 275, 948 N.E.2d 24, 29 (2011).

¶ 33 Here, as the trial court found, the record contradicts defendant's allegations because the officers verified the firearms were the same firearms they recovered from the scene. Officer Dick Heise testified he placed the firearm in a container and sealed it with his initials before the firearms were submitted for forensic testing. The firearms were returned in the same sealed container with the initials of the forensic scientists before being placed in the evidence vault. Even if there was a missing link in the chain of custody, the evidence is properly admitted "where there was testimony which sufficiently described the condition of the evidence when delivered which matched the description of the evidence when examined." *People v. Woods*, 214 Ill. 2d 455, 468, 828 N.E.2d 247, 255 (2005).

¶ 34 Thus, we conclude the trial court properly found defendant failed to state the gist of a claim on this issue.

¶ 35 C. Ineffective Assistance of Appellate Counsel

¶ 36 OSAD next argues defendant can make no colorable claim of ineffective assistance of counsel as it relates to defendant's appellate counsel on direct appeal. Because we have already determined defendant's claims of ineffective assistance of counsel regarding his trial attorney—as well as the underlying claims regarding the jury composition and admissibility of the firearms—are not meritorious, appellate counsel cannot be found ineffective for failing to raise those nonmeritorious arguments on direct appeal. *People v. Coleman*, 168 Ill. 2d 509, 523, 660 N.E.2d 919, 927 (1995). Defendant has therefore failed to state the gist of a claim on this issue.

¶ 37 III. CONCLUSION

¶ 38 Based on the foregoing, we affirm the trial court's judgment.

¶ 39 Affirmed.