2019 IL App (1st) 160487-U

No. 1-16-0487

Order filed February 1, 2019

Fifth 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-Appellant,	)	Cook County.
	)	
v.	)	No. 93 CR 18977
	)	
ALBERT SCOTT,	)	Honorable
	)	Thomas V. Gainer Jr.,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err when it summarily dismissed defendant's *pro se* postconviction petition.

¶ 2 Defendant Albert Scott appeals from the order of the circuit court summarily dismissing his *pro se* postconviction petition. On appeal, defendant argues that his petition set forth an arguable claim that appellate counsel was ineffective for failing to argue that the trial court

violated his right to confrontation when it permitted hearsay testimony that a codefendant identified him as one of the offenders in an armed robbery. We affirm.

¶ 3 Following a 1995 jury trial, defendant was found guilty of armed robbery (Ill. Rev. Stat. 1983, ch. 38. ¶ 18-2) and attempted first degree murder (Ill. Rev. Stat. 1983, ch. 38 ¶¶ 8-4, 9-1). The trial court sentenced defendant to 60 years' incarceration consecutive to a term of incarceration defendant was serving in California. On appeal, this court affirmed. *People v. Scott*, No. 1-95-2818 (1997) (unpublished order under Illinois Supreme Court Rule 23).

¶ 4 In 2015, defendant filed a *pro se* postconviction petition. The petition alleged, in relevant part, that the trial court improperly allowed hearsay testimony into evidence when the State elicited testimony from a police detective that a nontestifying codefendant identified defendant, in violation of the rule in *Bruton v. United States*, 391 U.S. 123 (1968). The petition further alleged that appellate counsel was ineffective for failing to argue the *Bruton* violation on appeal. In dismissing defendant's petition, the circuit court held, relying on *People v. Henderson*¸ 142 Ill. 2d 258, 304 (1990), that the detective only testified that he had a conversation with the codefendant and did not "gratuitously reveal" the substance of the conversation and that, therefore, the testimony was not hearsay. After reviewing defendant's remaining contentions of error, the circuit court dismissed defendant's petition as frivolous and patently without merit.

¶ 5 The evidence elicited at trial is fully set forth in our order affirming defendant's conviction. See *Scott*, No. 1-95-2818, order at 4. Therefore, we summarize the evidence as necessary to understand the issue in this appeal.

¶ 6 Defendant was tried separately. The State told the jury in opening statements that defendant, LaRosa Mullens, and Robert Stevenson robbed a minimart and shot at an employee, Omar Ali.

¶ 7 The evidence at trial established that on December 18, 1984, Andretta Terry and Ali were working the 11 p.m. to 7 a.m. shift at a gas station and convenience store. Terry was working the cash register and Ali was in the back stocking the coolers and shelves. There was one customer in the store, a cab driver. At approximately 2:55 a.m., three men entered the store. One walked past the register into the store, one remained at the door, and one stopped in front of the register. The man near the register, later identified as Robert Stevenson, displayed a sawed-off shotgun, pointed it at the chest of the cab driver, and announced "This is a stick-up." He then turned and pointed the shotgun at Terry's head, telling her to open the cash drawer and threatening to "blow her m*** brains out." Terry opened the drawer and sat down on a garbage can. Stevenson reached into the drawer and removed approximately $175 of cash and food stamps. Stevenson and the others began to leave the store.

¶ 8 As they were leaving, Ali began to move forward from the back. The man by the door, whom Ali later identified as defendant, pulled out a silver handgun and fired one shot in Ali's direction, striking the ceiling above his head. He fired a second shot, which struck a potato chip display, and the three men left the store.

¶ 9 In February 1985, Ali identified defendant in a photo array as the man standing near the door. Approximately nine years later, he identified defendant again in a lineup at a police station. Terry also viewed the lineup, but was unable to identify anyone. She explained that her attention had been focused on the man with the shotgun.

¶ 10 As relevant here, Chicago police detective John Paladino testified that, on February 18, 1985, he was in an interview room with LaRosa Mullens. Under questioning by the State, Paladino testified as follows:

> "Q [Assistant State's Attorney]: Did you have a conversation with LaRosa Mullens at that time?
>
> A [Paladino]: Yes, I did.
>
> Q: After you had this conversation with LaRosa Mullens, what did you do?
>
> A: I spoke to two detectives from Area One Violent Crimes by the name of Tom Tansey and Al McQuire.
>
> Q: Did you give them any names at that time?
>
> A: Yes, I did.
>
> Q: What names did you give them?
>
> A: I gave them the name of Albert Scott and Robert Stevenson.
>
> Q: What was that in regards to?
>
> A: It was in regards to [the] armed robbery of an Arco gas station located at 6659 South Cottage Grove.
>
> MR. VONGHER [Defense Counsel]: Objection, Judge.
>
> THE COURT: Overruled."

¶ 11 Chicago police detective Thomas Tansey testified that he was assigned to investigate the robbery. After he spoke to Paladino, he prepared an array of black and white photographs. The array included photographs of defendant, Stevenson, and five other individuals with similar physical characteristics. He showed the array to Ali, who identified defendant and Stevenson. He

also showed the array to Terry, who identified defendant. After unsuccessful attempts to locate defendant, Tansey obtained an arrest warrant for defendant on February 20, 1985. He did not obtain a warrant for Stevenson, because he was deceased.

¶ 12 Defendant contends that the circuit court erred when it dismissed his postconviction petition because it stated an arguable claim of ineffective assistance of appellate counsel. Defendant argues that appellate counsel was ineffective for failing to argue that the trial court erred when it allowed Paladino's testimony that Mullens gave him the names of defendant and Stevenson. Defendant argues that this testimony implied that Mullens had implicated defendant in violation of the rule in *Bruton*.

¶ 13 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)) "provides a method by which persons under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both." *People v. Hodges*, 234 Ill. 2d 1, 9 (2009); see also *People v. Begay*, 2018 IL App (1st) 150446, ¶ 27, appeal pending (No. 123866). At the initial stage of a postconviction proceeding, the circuit court may, as here, dismiss a petition as frivolous or patently without merit within 90 days. 725 ILCS 5/122-2.1(a)(2) (West 2014); see also *People v. Boykins*, 2017 IL 121365, ¶ 9. A petition is frivolous and patently without merit if the petition has no arguable basis in law or fact. *Hodges*, 234 Ill. 2d at 16. Such a petition is one that is based on an indisputably meritless legal theory or fanciful factual allegation. *Id.*

¶ 14 Claims of ineffective assistance of counsel are judged against the standard set forth in *Strickland v. Washington,* 466 U.S. 668 (1984). See, *e.g.*, *People v. Peterson*, 2017 IL 120331, ¶ 79 (citing *People v. Albanese*, 104 Ill. 2d 504, 526 (1984)). In order to meet the *Strickland*

standard, a defendant must show that (1) counsel's performance fell below an objectively reasonable level of assistance and (2) defendant was prejudiced as a result, *i.e.,* that there is a reasonable probability that the outcome of the proceeding would have been different. See *Peterson*, 2017 IL 120331, ¶ 79. When the *Strickland* standard is viewed through the lens of postconviction law, the question becomes whether "(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." *Hodges*, 234 Ill. 2d at 17.

¶ 15 Claims of ineffective assistance of appellate counsel are judged against the same two-pronged *Strickland* standard. *People v. Lacy*, 407 Ill. App. 3d 442, 457 (2011) (citing *Edwards*, 195 Ill. 2d at 163). "Appellate counsel is not required to brief every conceivable issue on appeal, however, and it is not incompetence for counsel to refrain from raising issues that counsel believes are without merit." *Edwards*, 195 Ill. 2d at 163-64. Unless the underlying issue has merit, a defendant suffers no prejudice as the result of appellate counsel's failure to raise an issue on appeal. *Lacy*, 407 Ill. App. 3d at 457. Accordingly, we must examine the merits of defendant's underlying claim of a hearsay violation to determine whether the failure to raise it during defendant's direct appeal constituted ineffective assistance.

¶ 16 Defendant argues that Paladino's testimony resulted in the improper admission of hearsay evidence, specifically the statement of nontestifying codefendant Mullens identifying defendant as participating in the robbery and shooting. Defendant concludes that this testimony violated the rule against hearsay and his right to confront the witnesses against him in violation of the rule in *Bruton v. United States*, 391 U.S. 123 (1968). The State responds that there was no *Bruton*

violation because Paladino was merely testifying to the investigative steps taken which led to defendant's identification and never revealed the substance of his conversation with Mullens.

¶ 17 In *Bruton*, at the defendant's joint trial with a codefendant, a postal inspector testified that the nontestifying codefendant orally confessed to him that he and the defendant committed the armed postal robbery at issue. *Id.* at 124. The Supreme Court held that the admission of testimony regarding a nontestifying codefendant's out-of-court statement at their joint trial inculpating the defendant implicated the confrontation clause and was error despite a jury instruction directing the jury to disregard the inadmissible hearsay. *Id.* at 136-37.

¶ 18 Illinois courts, have consistently held that the introduction of hearsay statements from a codefendant implicating the defendant during a joint trial violates the confrontation clause. See, *e.g.*, *People. v. Williams*, 182 Ill. 2d 171, 185, 187 (1998). The rule is not so broad, however, that it precludes the admission of testimony that may by inference implicate a defendant without revealing the substance of a nontestifying codefendant's statement. See *People v. Smith*, 177 Ill. 2d 53, 77-78 (1997) ("This court has held that testimony recounting the course of a police investigation is admissible and does not violate the sixth amendment, even if a jury would conclude that the police began looking for a defendant as a result of what nontestifying witnesses told them, as long as the testimony does not gratuitously reveal the substance of the codefendants' statements.") The rationale for this rule is that an arresting or investigating officer should not be put in the false position of seeming to simply happen upon a defendant by blind luck. See *People v. Matthews*, 2017 IL App (4th) 150911, ¶ 19 (discussing *People v. Cameron*, 189 Ill. App. 3d 998, 1003-04 (1989)).

¶ 19 Here, we find that there was no hearsay or confrontation clause error. Quite simply, the testimony elicited never revealed the substance of Paladino's conversation with Mullens. Defendant may be correct that it is a simple logical leap to conclude that something Mullens said implicated defendant. However, the jury was never asked to make that logical inference, and such an inference was not necessary to find defendant guilty. The questions asked of Paladino never explicitly revealed the substance of his conversation with Mullens in any way, and it was not improper to elicit testimony describing the course of the police investigation. See *Smith*, 177 Ill. 2d at 77-78. Because there was no error in admission of the evidence, appellate counsel was not ineffective for electing not to argue the meritless claim. See *Edwards*, 195 Ill. 2d at 163-64.

¶ 20 Defendant argues that *People v. Armstead*, 322 Ill. App 3d 1 (2001), is analogous and should control. We disagree. In *Armstead*, the court found that a police officer's testimony as to statements made by a nontestifying party identifying the defendant were inadmissible hearsay. *Id*. at 13. However, the officer's testimony went far beyond recounting the steps in an investigation. *Id.* at 7-8. Instead, the officer testified that, while speaking with the witness, he "ascertain[ed] the identity of a shooter," and then the officer named the defendant as a person of interest. *Id.* at 7-8. Here, the State avoided eliciting any details of the substance of Paladino's conversation with Mullens. Instead, Paladino's testimony merely demonstrated that he learned defendant's identity as a result of the conversation, an essential part of the overall narrative. Without Paladino's testimony, the jury would have been left to wonder how and why defendant's photograph was included in the array of photos shown Ali. Therefore, Paladino's testimony was not inadmissible hearsay and did not implicate the confrontation clause. See *People v. Peoples*, 377 Ill. App. 3d 978, 987 (2007) (distinguishing *Armstead*).

¶ 21 We likewise find defendant's reliance on *People v. Sample*, 326 Ill. App. 3d 914 (2001) misplaced. In *Sample*, the State elicited testimony that, after speaking with codefendants, the police had the defendant's name and began looking for him. Defendant contends that *Sample* held that "the strong inference was that the codefendants had implicated the defendant in the crime." Defendant's representation of the holding in *Sample*, however, leaves out significant portions of the court's analysis. The *Sample* court held:

> "On balance, however, the repetition of strong inferences that his co-defendants implicated defendant in the crimes, the use of those statements to build a substantive link in the State's case, and the State's several comments on the upcoming testimony during opening statement, lead us to conclude that the boundaries set for the investigative process hearsay exception were breached." *Sample*, 326 Ill. App. 3d at 924.

Here, the inference was not repeated, the statements were never used as a substantive link in the State's case, and the State never commented on the upcoming testimony in its opening statement. Simply put, none of the factors which supported the *Sample* court's decision are present in the case before us. Therefore, *Sample* does not compel a similar conclusion.

¶ 22 For the reasons stated, we find that defendant's allegation of a *Bruton* violation has no merit. Because this underlying claim has no merit, appellate counsel was not ineffective for failing to argue the issue. Therefore, defendant's postconviction petition lacks an arguable claim of prejudice, and the circuit court did not err when it dismissed the petition as frivolous and patently without merit. Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 23 Affirmed.