2019 IL App (1st) 162181-U

No. 1-16-2181

May 28, 2019

First Division

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. 11 CR 412
	)	
JUAN FLORES,	)	Honorable
	)	Geary W. Kull,
Defendant-Appellant.	)	Judge presiding.

JUSTICE WALKER delivered the judgment of the court.
Presiding Justice Mikva and Justice Pierce concurred in the judgment.

ORDER

¶ 1 *Held*: The second-stage dismissal of defendant's postconviction petition is affirmed where postconviction counsel filed a Rule 651(c) certificate and defendant did not overcome the presumption that he was provided reasonable assistance of counsel.

¶ 2 Defendant Juan Flores appeals from the second-stage dismissal of his amended petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2014)). On appeal, he contends that postconviction counsel failed to provide reasonable assistance because counsel did not include a claim of ineffective assistance of appellate counsel and did not

support his claim of ineffective assistance of trial counsel with sufficient facts and law. We affirm.

¶ 3 BACKGOUND

¶ 4 Flores and codefedant Carlos Garcia were each charged by indictment with one count of possession of cannabis (720 ILCS 550/4(g) (West 2010)) and one count of possession of cannabis with intent to deliver (720 ILCS 550/5(g) (West 2010)). [1] The charges arose from an incident in which police found more than 5000 grams of cannabis in a van they both occupied. Defendant and Garcia were tried in separate, but simultaneous bench trials.

¶ 5 At trial, Forest Park police officer Michael Harrison testified that at about 10:30 p.m. on October 26, 2010, he conducted a traffic stop of a gray van in Maywood, Illinois. When the van stopped, the driver, later identified as Garcia, fled on foot. While other officers pursued Garcia, Harrison approached the van and found defendant in the passenger's seat. He was the only occupant of the vehicle. While Harrison was taking defendant into custody, he noticed "[a]n extremely overwhelming smell of fresh cannabis" emanating from the van. Harrison searched the van, and found a black garbage bag directly behind the center console. The garbage bag, which was within arm's reach of both the driver's seat and the passenger's seat, contained 10 clear, heat-sealed plastic bags of suspected cannabis. Behind the garbage bag, there were two different plastic bags containing suspected cannabis and $1162 in cash. Harrison searched defendant and recovered an additional $1177 in cash from his person.

[1] Garcia was found guilty on both counts and sentenced to six years' imprisonment. He is not a party to this appeal.

¶ 6 On cross-examination,[2] Harrison testified that the van's front air bags had deployed. He smelled cannabis "immediately" upon walking up to the van. Defendant did not make any movements or attempt to conceal anything. After removing defendant from the vehicle, Harrison searched the van for firearms. He acknowledged that his police report did not mention an odor of cannabis coming from the van.

¶ 7 On redirect examination, Harrison identified on a photograph where he found the black garbage bag within the van. He explained that he moved the bag to the passenger's seat in order to photograph it. He did not smell anything besides cannabis when he approached the van.

¶ 8 River Forest police officer Glen Czernik testified that he assisted in the traffic stop. When Garcia fled on foot, Czernik pursued and arrested him approximately 40 seconds later.

¶ 9 The State entered the stipulated testimony of Penny Evans, a forensic chemist for the Illinois State Police. Evans tested 6 of the 11 heat-sealed bags, which tested positive for 5758.7 grams of cannabis. The total estimated weight of all 11 bags was 10,557.6 grams. The parties further stipulated that the van was registered to neither defendant nor Garcia.

¶ 10 The State rested, and trial counsel moved for a directed finding, arguing that "[t]his is clearly nothing more than a constructive possession case," and that defendant had no knowledge of or connection to the drugs. Trial counsel attacked Harrison's claim that he smelled cannabis in the van, noting that his police report did not mention the odor, and that the bags were heat-sealed "for the purposes of keeping in freshness and odor." The court denied the motion, and the defense rested without presenting evidence.

[2] Defendant and Garcia's trial counsels separately cross-examined Harrison. Defendant's counsel adopted the cross examination by Garcia's counsel.

¶ 11 At closing, trial counsel argued that "there's absolutely no tie that [defendant] has to the vehicle [or] to the narcotics," and that the State had not proven defendant's knowledge of the cannabis. The trial court found defendant guilty on both counts.

¶ 12 In his posttrial motion, defendant challenged the sufficiency of the State's evidence in various respects. The trial court denied the motion and, following a hearing, imposed a sentence of 12 years' imprisonment for possession of cannabis with intent to deliver.

¶ 13 Defendant filed a notice of appeal on July 12, 2013. On February 28, 2014, while his direct appeal was pending, defendant filed a *pro se* postconviction petition. Defendant alleged that trial counsel was ineffective for failing to (1) "challenge the constructive possession" by emphasizing that defendant "was simply a guest passenger" who had never been in the van before, "did not know anything of the van," and never "exercised control over the vehicle"; (2) cite case law during the trial; (3) move to sever the trials; (4) "challenge the initial contact with the police"; (5) call an expert witness to testify that the airbags and heat-sealed plastic bags would have masked the odor of cannabis; (6) impeach Harrison with the omission of the odor from his police report; (7) file a motion to quash arrest and suppress evidence; and (8) investigate defendant's claims. Defendant also alleged that he only waived his right to a jury trial in reliance on trial counsel's "erroneous advice," and that counsel had a conflict of interest because she was employed by the same law firm as Garcia's trial attorney. The circuit court docketed the petition and appointed postconviction counsel on July 2, 2014.

¶ 14 At a hearing in January 2015, postconviction counsel informed the court that he had learned of the pending direct appeal and requested additional time "to find out what issues [defendant is] appealing and work out what issues, if any, he should present in his post-

conviction" petition. In April 2015, postconviction counsel reported that he telephoned defendant's private appellate counsel, but was unable to determine what issues would be raised on direct appeal.

¶ 15 At the next court date, in May 2015, postconviction counsel announced that he had conferred with appellate counsel and "went over some of the issues" with defendant. Postconviction counsel informed the court that defendant's direct appeal was not raising ineffective assistance of trial counsel, but that defendant's amended postconviction petition likely would. The court granted postconviction counsel additional time to review and amend defendant's *pro se* petition.

¶ 16 At a hearing in July 2015, postconviction counsel stated that he had "complied with all of the statutory requirements and communication investigation to determine the claims" and completed a certificate pursuant to Illinois Supreme Court Rule 651(c). Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). However, he declined to file the certificate because he had not yet completed the amended petition.

¶ 17 On September 22, 2015, this court released its decision in defendant's direct appeal. Defendant only challenged the sufficiency of the evidence, claiming that the State failed to prove that he actually or constructively possessed the cannabis. *People v. Flores*, 2015 IL App (1st) 132220-U, ¶ 12. We affirmed, finding that the odor and location of the cannabis within the van supported an inference that he had knowledge of and control over the drugs. *Id.* ¶ 19.

¶ 18 At a hearing on October 2, 2015, postconviction counsel acknowledged receipt of the September 22, 2015 order and stated that it "determine[d] some things" that he needed to discuss with defendant. Subsequently, on October 9, 2015, postconviction counsel informed the court

that he had spoken to defendant about the direct appeal order, and that defendant still wished to pursue a postconviction claim. Accordingly, postconviction counsel filed an amended postconviction petition on that date. Counsel also filed a certificate pursuant to Rule 651(c), certifying that he had communicated with defendant, reviewed the record and defendant's *pro se* petition, and amended defendant's claims as required.

¶ 19 The amended petition, which purported to "not replace the original petition, but add to it," alleged that trial counsel was ineffective in failing to file a motion to quash arrest and suppress evidence. It recounted the background of the case, and set forth the relevant legal standards for demonstrating ineffective assistance of counsel based on failure to file a pretrial motion. The petition then argued that trial counsel "should have more closely investigated the facts surrounding Harrison's arrest of [defendant]," and "should have written, filed and argued a motion to quash arrest and suppress evidence." It further contended that such a motion "had merit" because defendant "did nothing nor did he actually possess anything which could have produced cause" for his arrest, and because he could have challenged Harrison's ability to smell the cannabis as Harrison claimed at trial. Attached to the petition was an affidavit from defendant in which he averred that trial counsel did not consult with him, advise him of his right to a jury trial, or investigate potentially favorable evidence "such as expert [t]estimony about the alleged cannabis smell and the deployed air bags."

¶ 20 The State filed a motion to dismiss the amended petition, arguing that the ineffective assistance claims were procedurally barred and otherwise insufficient to make a substantial showing of a constitutional violation. During the hearing on the motion, the State argued that a motion to suppress would have been futile because defendant made no showing that his arrest

was unconstitutional. The court asked whether defendant had standing to challenge the search and seizure. Postconviction counsel replied that defendant could have challenged both the initial stop and the subsequent search of the van because he was a passenger in the vehicle and was ultimately charged with possession of its contents.

¶ 21 Next, the court asked whether there was "a traffic violation" or other "reason given" that could have supported probable cause to stop the van. Postconviction counsel replied "Yes."[3]

¶ 22 Turning to the search, the court then asked postconviction counsel how a motion to suppress could have been granted where Harrison smelled marijuana "in the natural course of conduct that is not a violation of anybody's Fourth *** Amendment rights or any other rights." Counsel reiterated that the search and seizure were challengeable because defendant "was ultimately arrested for constructive possession of that marijuana."

¶ 23 In announcing its decision, the court noted that "[t]he question is whether or not filing that Fourth Amendment motion [would have] had some basis in fact." To that end, the court found that "it appears [defendant] has no standing to *** complain about the search of the vehicle because it's not his vehicle. He is not driving the vehicle, and he does not allege a proprietary interest in the material that was recovered." The court continued:

[3] Although the reasons for the traffic stop are unclear from the trial evidence alone, several documents in the transcripts and common law record, which would have been available to postconviction counsel, give context to the circumstances of the stop. First, defendant's arrest report indicates that the van "fled from a shots fired call" and was involved in two separate accidents while fleeing from police. Prior to trial, the State informed the court that it dismissed Garcia's traffic tickets for "fleeing and eluding, and some other stuff," and instead would proceed only on the felony charges. Defendant's posttrial motion states that Garcia "fled from the police in a high-speed chase," and defendant's motion to reconsider sentence similarly asserts that he "was merely the passenger in the car that fled from police." During a hearing on defendant's motion for new trial, defendant's trial counsel confirmed that Garcia had been in a traffic accident and fled the scene.

> "I hesitate to see how any lawyer could, in good conscious [*sic*], file a motion to quash. It's not even a matter of trial strategy. I think it's simply a matter of law that there does not appear to be a motion available to [defendant], at least not from what I read in these documents."

Consequently, the court found that defendant had failed to make a substantial showing that his constitutional rights were violated, and dismissed both defendant's *pro se* petition and his amended petition.

¶ 24 ANALYSIS

¶ 25 Defendant now appeals, arguing that postconviction counsel did not provide reasonable assistance because he (1) failed to add a claim of ineffective assistance of appellate counsel in the amended petition, and (2) failed to support the claim of ineffective assistance of trial counsel for failing to file a motion to quash arrest and suppress evidence with sufficient law and evidence. Consequently, defendant asks us to vacate the dismissal of his postconviction petition and remand the matter for the appointment of new counsel and further proceedings.

¶ 26 The Act provides a procedural mechanism by which a criminal defendant can assert that his conviction resulted from a substantial denial of his constitutional rights. See 725 ILCS 5/122-1 *et seq.* (West 2014). Proceedings under the Act unfold in three stages. At the first stage, a defendant files a *pro se* petition for postconviction relief, and the circuit court must determine whether the petition is "frivolous or patently without merit." *People v. Morris*, 236 Ill. 2d 345, 354 (2010). If a petition survives the first stage, it proceeds to the second stage, where the defendant must make a substantial showing of a constitutional violation. *People v. Domagala*, 2013 IL 113688, ¶ 33. At the second stage, an indigent defendant is appointed an attorney to

ensure that his claims are adequately presented. 725 ILCS 5/122-4 (West 2014); *People v. Greer*, 212 Ill. 2d 192, 204 (2004). Because the right to such representation is statutory, rather than constitutional, the required level of representation is determined solely by the Act. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). Our supreme court has defined the assistance provided for in the Act as a "reasonable" level of assistance. *Id.*

¶ 27 To ensure that defendants are provided reasonable assistance, Rule 651(c) imposes certain requirements upon postconviction counsel. Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013); *Perkins*, 229 Ill. 2d at 42 (2007). Under Rule 651(c), postconviction counsel must (1) consult with the defendant to ascertain his allegations, (2) examine the record of trial proceedings, and (3) amend the *pro se* petition as "necessary for an adequate presentation of [defendant's] contentions." Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013).

¶ 28 The rule also provides that the record shall contain "a showing" that postconviction counsel fulfilled these duties, which he may demonstrate by filing a certificate under the rule. *Id.* The filing of a Rule 651(c) certificate creates a rebuttable presumption that postconviction counsel provided reasonable assistance. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23. The defendant bears the burden of overcoming this presumption by showing that counsel failed to "substantially comply" with the duties set forth in Rule 651(c). *People v. Rivera*, 2016 IL App (1st) 132573, ¶ 36. Compliance with the rule is reviewed *de novo*. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 17.

¶ 29 Here, postconviction counsel filed a Rule 651(c) certificate, thereby creating a presumption that he rendered reasonable assistance. *Jones*, 2011 IL App (1st) 092529, ¶ 23. The record shows that postconviction counsel consulted with defendant on multiple occasions and

familiarized himself with the record and *pro se* petition. The record also reflects that postconviction counsel communicated with appellate counsel to determine what issues defendant would raise on direct appeal, which he discussed with defendant, and amended the postconviction petition accordingly.

¶ 30 Defendant argues, however, that postconviction counsel failed to adequately present his claims. Defendant contends that postconviction counsel should have added a claim of ineffective assistance of appellate counsel to the amended petition because defendant's claim that trial counsel was ineffective for failing to file a motion to quash arrest and suppress evidence was otherwise procedurally barred. Defendant maintains that postconviction counsel should have provided additional facts and law to supplement the underlying claim of ineffective assistance of trial counsel.

¶ 31 As a general rule, postconviction counsel is under no obligation to add a claim not alleged in the *pro se* petition. *People v. Pendleton*, 223 Ill. 2d 458, 476 (2006). Several cases on which defendant relies have held that, in certain instances, postconviction counsel is required to raise ineffective assistance of appellate counsel when necessary to circumvent forfeiture of other claims. See *People v. Turner*, 187 Ill. 2d 406 (1999); *People v. Schlosser*, 2012 IL App (1st) 092523; *People v. Milam*, 2012 IL App (1st) 100832. However, each of these cases expressly noted that the failure to allege ineffective assistance of appellate counsel was unreasonable because it prevented the circuit court from considering the merits of the defendants' underlying claims. *Turner*, 187 Ill. 2d at 413; *Schlosser*, 2012 IL App (1st) 092523, ¶ 25; *Milam*, 2012 IL App (1st) 100832, ¶ 36.

¶ 32 Here, by contrast, it is clear that the circuit court considered the merits of defendant's underlying claim that trial counsel was ineffective for failing to file a motion to quash. As defendant acknowledges on appeal, the court ultimately dismissed his petition, not on procedural grounds, but rather because it found his allegations lacking on the merits. Thus, we cannot say that postconviction counsel failed to adequately present the claim where he facilitated a consideration on the merits. Although defendant also questions the court's legal reasoning in deciding that a motion to quash would have been meritless, this does not speak to the question before us, which is limited to whether postconviction counsel provided reasonable assistance. See *Turner*, 187 Ill. 2d at 417 (whether counsel provided reasonable assistance is a different inquiry from whether the claims were meritorious).

¶ 33 Defendant also argues that postconviction counsel failed to comply with Rule 651(c) because he did not provide sufficient facts or law to make a substantial showing that trial counsel was ineffective in failing to file a motion to quash arrest and suppress evidence. Rule 651(c) does not require postconviction counsel to amend a petition to advance a "frivolous or patently nonmeritorious" line of argument. *Greer*, 212 Ill. 2d at 205. " 'Where there is not a showing that sufficient facts or evidence exists, inadequate representation certainly will not be found because of an attorney's failure to amend a petition or, when amended, failing to make the petition's allegations factually sufficient to require the granting of relief.' " *People v. Spreitzer*, 143 Ill. 2d 210, 221 (1991) (quoting *People v. Stovall*, 47 Ill. 2d 42, 46 (1970)).

¶ 34 Here, postconviction counsel filed an eight-page amended petition laying out the facts and law relevant to defendant's ineffective assistance of trial counsel claim. The amended petition incorporated defendant's *pro se* petition, and set forth an argument as to why trial

counsel's performance was both deficient and prejudicial. Postconviction counsel also obtained and attached an affidavit in which defendant averred that trial counsel decided not to file a pretrial motion without consulting with him or investigating the facts of the case. We find this sufficient to substantially comply with Rule 651(c).

¶ 35 Defendant nevertheless argues that postconviction counsel violated the rule by failing to establish a meritorious fourth amendment challenge through sufficient facts and law. In particular, defendant asserts that postconviction counsel should have added "new evidence" that would have given context to the initial traffic stop and established that defendant had a reasonable expectation of privacy in the van. However, defendant fails to identify any new facts or law that would bolster his claims. While postconviction counsel must present a defendant's claims in appropriate legal form, "he is under no obligation to actively search for sources outside the record that might support general claims raised in a post-conviction petition." *People v. Johnson*, 154 Ill. 2d 227, 247 (1993). As such, it falls on the defendant to inform postconviction counsel "with specificity" about the sources of potentially useful information. *Id.* at 247-48. The record shows that postconviction counsel consulted with defendant multiple times, and defendant does not allege that he identified new sources for postconviction counsel to investigate.

¶ 36 As for facts within the record, we agree with defendant that the precise circumstances surrounding the initial stop are unclear. However, Harrison testified that he conducted a "traffic stop" of the van. Additionally, several documents in the record, which would have been available to both trial and postconviction counsel, indicate that the van was stopped after Garcia committed a traffic violation and fled from police. Thus, there does not appear to be a basis to challenge the initial stop. See *People v. Hackett*, 2012 IL 111781, ¶ 20 (traffic stop is generally

reasonable where the officer has either probable cause or articulable suspicion to believe that a traffic violation occurred). As defendant has made no showing to the contrary, we cannot say that postconviction counsel was unreasonable for failing to provide an alternative explanation. See *Perkins*, 229 Ill. 2d at 51 (declining to assume that facts favorable to the defendant existed where he did not identify them on appeal).

¶ 37 Defendant further argues that postconviction counsel should have added facts and law establishing his reasonable expectation of privacy in the van. Again, this argument presupposes that such facts and law existed. However, the record shows that Harrison smelled cannabis upon approaching the van during the traffic stop. Thus, the propriety of the search is clear. See *People v. Stout*, 106 Ill. 2d 77, 88 (1985) (officer's uncorroborated testimony that he smelled cannabis was sufficient to justify the warrantless search of a vehicle); see also *U.S. v. Mosby*, 541 F.3d 764, 768 (7th Cir. 2008) ("The smell [of cannabis] alone was enough to give rise to probable cause to search the entire vehicle, including closed containers like the garbage bag.").

¶ 38 Nevertheless, defendant contends that postconviction counsel was unreasonable for failing to argue that a reasonable expectation of privacy in the van existed because defendant (1) was "legitimately present" in the van, (2) had prior use of the van, (3) had the "ability to control or exclude others' use of the van," and (4) had a "subjective expectation of privacy in the van." See *People v. Johnson*, 114 Ill. 2d 170, 191-92 (1986) (reviewing factors relevant to whether a person has a reasonable expectation of privacy in a vehicle). Although defendant asserts that postconviction counsel should have demonstrated these factors, he does not identify how counsel could have done so. Moreover, defendant's *pro se* petition belies his argument on appeal. The *pro se* petition alleges that defendant "was simply a guest passenger," had never ridden in the

van before, "did not know anything of the van," and never "exercised control over the vehicle." Postconviction counsel was not obligated to refute defendant's own factual allegations or offer new evidence not identified by defendant that would have made his claim meritorious. We therefore do not find that postconviction counsel provided unreasonable assistance.

¶ 39 Finally, defendant argues that two charges, the $5 "Electronic Citation Fee" (705 ILCS 105/27.3e (West 2010)) and the $250 "State DNA ID System" fee (730 ILCS 5/5-4-3(j) (West 2012)), were improperly assessed against him. Defendant acknowledges that he did not challenge his fines and fees order in the trial court, on direct appeal, or in his *pro se* or amended postconviction petitions. He nevertheless argues that we may review the issue under our supreme court's decision in *People v. Caballero*, 228 Ill. 2d 79 (2008), because correcting his fines and fees order is a simple ministerial act that will promote judicial economy.

¶ 40 However, as defendant has forfeited his claims, we lack jurisdiction to consider them. *Brown*, 2017 IL App (1st) 150203, ¶ 40. *Caballero* does not allow us to review, for the first time in postconviction proceedings, "*substantive* issues, such as whether particular assessments apply to [defendant's] case" under "the guise of applying [a] ministerial correction." (Emphasis in original.) *Id.* Furthermore, "notions of judicial economy, by themselves, cannot create jurisdiction where it does not otherwise exist." *People v. Grigorov*, 2017 IL App (1st) 143274, ¶ 16. Accordingly, we will not address the merits of defendant's fines and fees claims.

¶ 41 CONCLUSION

¶ 42 For the foregoing reasons, the dismissals of defendant's *pro se* and amended postconviction petitions are affirmed.

¶ 43 Affirmed.