2019 IL App (2d) 160867-U
No. 2-16-0867
Order filed June 19, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JUAN HINOJOSA, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 14-CF-926 Honorable Edward C. Schreiber, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Birkett and Justice Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly summarily dismissed defendant's postconviction petition, which alleged that trial counsel was ineffective for abandoning an allegedly meritorious motion to suppress: counsel reasonably leveraged the motion to obtain a very favorable plea deal, and in any event the motion was not necessarily meritorious.

¶ 2 Defendant, Juan Hinojosa, appeals the first-stage dismissal of his petition under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2016)). That petition asserted that guilty-plea counsel was ineffective when he failed to pursue a motion to suppress evidence of drugs seized from defendant's person; defendant asserted that that evidence was "Fruit of the

Poisonous Tree." On appeal, defendant asserts that, although his presentation of the issue in his petition was inartful, he nevertheless stated the gist of a constitutional claim. He asserts that, given the likely success of his suppression motion and that it was potentially dispositive, no reasonable lawyer would have abandoned the motion. We hold that the record contradicts defendant's specific claim that counsel failed to act reasonably. We thus affirm the court's dismissal of his petition.

¶ 3 I. BACKGROUND

¶ 4 A Kane County grand jury indicted defendant on two cocaine-possession counts: one count of unlawful possession of 15 or more but less than 100 grams of a substance containing cocaine (720 ILCS 570/401(a)(2)(A) (West 2014)) (Class 1), and one count of unlawful possession, with intent to deliver, of 15 or more but less than 100 grams of a substance containing cocaine (720 ILCS 570/401(a)(2)(A) (West 2014)) (Class X).

¶ 5 On November 6, 2014, defense counsel filed a motion to suppress the evidence seized in what the motion asserted was an unlawful arrest. According to the motion, the arrest took place while defendant was the invitee of Martin Reyes-Hernandez at Reyes-Hernandez's house in Gilberts. The police entered the house without a warrant and without permission from anyone in the house. The officers immediately handcuffed defendant and searched him before searching the house. They then told defendant that they wanted the keys to his apartment. He said that he did not have them, and the officers searched him again, this time finding the cocaine at issue. He asserted that the second search was a violation of his fourth-amendment rights. On November 12, 2014, counsel told the court that he had filed the motion, that discovery was ongoing, and that he thought that the motion could be set for an evidentiary hearing shortly.

¶ 6 On June 11, 2015, with the suppression motion still pending, counsel told the court that the State had proposed a plea agreement and that he was "within [his] 30 days on their offer." He stated that he "want[ed] to reset the motion"—no motion other than the suppression motion appears to have been pending. However, he told the court, "But if I reset, then all offers are off." The court noted that June 25, 2015, was the last day that the State's offer was open.

¶ 7 On June 25, 2015, defendant accepted a plea agreement in which he pled guilty to one count of Class 4 unlawful possession of a substance containing cocaine (720 ILCS 470/402(c) (West 2014)) (no amount specified), the State nolle-prossed the Class X charge, and the State recommended a sentence of three years' imprisonment. The court noted that it was aware that the "offer *** was being held open until today." The State set out a factual basis:

> "[On May 28 2014], officers from the Cook County Narcotics Task Force obtained consent from Martin Reyes Hernandez to enter a residence.
>
> They located an amount of cocaine in that residence. They subsequently patted down the defendant's *** right pant pocket. They subsequently discovered a substance in the pocket."

Field and laboratory testing of the substance indicated that it contained cocaine. Defense counsel "t[ook] issue *** with any consensual contact," but stated, "that isn't our issue." The court accepted the agreement. At the same hearing, defendant also entered a guilty plea in an earlier case—case No. 05-CF-863. He agreed to plead guilty to "Count 1, unlawful delivery of a controlled substance within 1000 feet of a park," and the State agreed to recommend a sentence of six years' imprisonment.

¶ 8 Defendant and the State then became involved in litigating his total period of incarceration in this case and another Kane County drug case. This resulted in a sentencing order

that reduced his sentence in this case to one year's imprisonment. This agreed change was to give defendant the benefit of the bargain as to presentencing credits he believed he would receive from the dual plea agreements.

¶ 9 On July 8, 2016, defendant filed a *pro se* postconviction petition. He asserted that his "Fourth Amendment Rights were violated when detectives subjected him to an illegal search and seized inadmissible evidence. His Sixth Amendment Rights were violated as well when counsel's assistance was ineffective allowing him to be convicted with Fruit of the Poisonous Tree." He argued that the search of his body was the fruit of the illegal entry into Reyes-Hernandez's house. He further alleged, "On November 13, 2015, Judge James Hallock ruled that police failed to get consent from Mr. [Reyes-]Hernandez to search his home and prosecutors dismissed the charges." He attached an article from what appears to be the Daily Herald noting that the State had dropped charges against Reyes-Hernandez after Judge Hallock ruled that the search that resulted in Reyes-Hernandez's arrest was illegal because it was without a warrant and without consent. He also attached a copy of a Kane County Sheriff's Department report that tended to show that the incident discussed in the newspaper article was the incident in which he was arrested.

¶ 10 On September 29, 2016, the court dismissed defendant's petition at the first stage:

> "[Defendant] has alleged no facts which would entitle him to a reasonable expectation of privacy inside the home of Martin Reyes Hernandez. Petitioner does not address facts surrounding the pat down, which he admits resulted in the discovery of 55 grams of cocaine 'in his pocket'. Nor does he allege that the pat down was unconstitutional. [Defendant] simply argues that 'because the search of Mr. [Reyes-]Hernandez's home was illegal, the search of [defendant's] person was as well.' "

¶ 11 Defendant timely appealed. The record on appeal appears to lack transcripts of some of the preplea proceedings.

¶ 12 II. ANALYSIS

¶ 13 On appeal, defendant asserts that his "petition alleged the gist of a constitutional claim that his trial counsel was ineffective for not pursuing [the] motion to suppress where the police had no basis to search the defendant." He argues that, although his petition focused on the lack of consent or a warrant to enter Reyes-Hernandez's house, the petition was sufficient to assert that counsel should not have abandoned the suppression motion, which asserted that the police lacked probable cause to search him, and especially to search him a second time. He contends, "[T]here is no feasible argument that defense counsel's actions in failing to pursue the motion were trial strategy, where no reasonable attorney would forego a pretrial motion that has a chance of success, resulting in the dismissal of charges, in favor of encouraging the defendant to plead guilty." He portrays counsel as inexplicably dropping the suppression motion despite restating its merit even at the hearing at which the court accepted the plea agreement.

¶ 14 In response, the State asserts that the claim is procedurally defaulted because defendant could have filed a direct appeal and raised it then. Recognizing that its "argument of procedural default in this context has been rejected by other courts," it asks us "to re-examine those holdings, depart from them, and reach a better-reasoned decision." Alternatively, it argues that defendant failed to allege that the plea was involuntary or that he would have not entered the plea if counsel had acted reasonably. It further contends that the "fact that evidence recovered from [Reyes-]Hernandez's home was suppressed in a case against [Reyes-]Hernandez is of no help to defendant," because fourth-amendment-rights can be asserted only by the person holding them.

In so arguing, it asserts that defendant's claim on appeal was not contained in his postconviction petition.

¶ 15 We hold that, although no procedural default occurred, the court did not err in dismissing the petition. Defendant's petition failed to state the gist of an ineffective-assistance claim in that it suggested neither (1) that anything counsel did was unreasonable; nor (2) that, had counsel acted more reasonably, defendant would have rejected the plea agreement. In so holding, we take into account that the record strongly suggests that defendant's extremely favorable plea agreement was the result of his agreeing to abandon the suppression motion.

¶ 16 Initially, we consider and reject the State's assertion that, because defendant did not file a direct appeal and raise his claim there, the petition was subject to dismissal based on procedural default. We do not agree that a claim of the kind defendant raises is generally amenable to being raised on direct appeal.

¶ 17 At the first stage of a postconviction proceeding, the trial court, within 90 days of the petition's filing, reviews the petition independently of the parties; taking the allegations in the petition as true, to the extent that they are not contradicted by the record, it determines whether the petition as a whole is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2016); *People v. Coleman*, 183 Ill. 2d 366, 382 (1998). At this first stage, "a *pro se* defendant need allege only enough facts to make out the 'gist' of a constitutional claim" (*People v. Kane*, 2013 IL App (2d) 110594, ¶ 26) and the court should dismiss it as frivolous or patently without merit "only if [it] has no arguable basis either in law or in fact" (*People v. Hodges*, 234 Ill. 2d 1, 12 (2009)). That said, a court may dismiss a petition at the first stage if its claims are procedurally defaulted. *Kane*, 2013 IL App (2d) 110594, ¶ 26. Thus, a claim that a defendant could have raised in a prior proceeding is barred, and a petition that raises only such claims is

subject to first-stage dismissal. *People v. Blair*, 215 Ill. 2d 427, 442-46 (2005). Our review of a first-stage dismissal is *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶ 18 The State recognizes that appellate court decisions such as *People v. Miranda*, 329 Ill. App. 3d 837, 841-43 (2002), and *People v. Brooks*, 371 Ill. App. 3d 482, 484-86 (2007), have concluded that a defendant who pleads guilty need not raise an ineffective-assistance-of-counsel claim in a motion under Illinois Supreme Court Rule 604(d) (eff. July 1, 2017) and on direct appeal to avoid its forfeiture in any postconviction proceeding. However, it argues that *People v. Whitfield*, 217 Ill. 2d 177, 187-88 (2005), despite holding that a defendant did not forfeit a claim of improper guilty-plea admonishments, nevertheless requires a determination of forfeiture in a case such as this. Specifically, it argues that the *Whitfield* court, despite deeming that a claim of improper admonitions was not forfeited, nevertheless left open the possibility that other claims arising from guilty-plea proceedings might be forfeited. It emphasizes that the *Whitfield* court stated that, "under the facts of [the] case," no forfeiture occurred. *Whitfield*, 217 Ill. 2d at 188. It notes that the *Whitfield* court stated that "it would be incongruous to hold that [the] defendant forfeited the right to bring a postconviction claim because he did not object to the circuit court's failure to admonish him," as that "would place the onus on [him] to ensure his own admonishment in accord with due process." *Whitfield*, 217 Ill. 2d at 188. It also notes that the *Whitfield* court further commented that the defendant alleged that he had not learned of the improper admonishments until he was in prison and any Rule 604(d) motion would have been untimely. The State therefore argues that "[t]he language in *Whitfield*, which is in harmony with *** principles of procedural default, suggests that a defendant may waive his right to a review of claims by failing to pursue them in a direct appeal," and that this is in keeping with a sensible balancing of the rights of defendants and interest in the finality of judgments. It asserts that here,

"[w]here, for no discernible reason, defendant failed to properly pursue a direct appeal, he frustrated the State's legitimate interest in finality and his claims should be procedurally defaulted."

¶ 19 We find the State's argument unpersuasive. Just as it would be "incongruous to hold that [a] defendant forfeited the right to bring a postconviction claim because he did not object to the circuit court's failure to admonish him" (*Whitfield*, 217 Ill. 2d at 188), it would also be incongruous to hold that he forfeited the right to bring an ineffective assistance claim because he failed to recognize that counsel gave him unreasonable advice. Rule 604(d) bars one from appealing to challenge a guilty plea unless, no more than 30 days after sentencing, he or she files a motion to withdraw the plea. Ill. S. Ct. R. 604(d) (eff. July 1, 2017). The *Whitfield* court recognized the oddity and injustice of expecting that a defendant would recognize in that short time that the trial court had failed to inform him of the very things that the law deems necessary for the court to tell him. It is similarly odd to recognize that a defendant needs counsel to navigate a guilty-plea proceeding and to simultaneously insist that he must, without assistance of counsel, recognize counsel's flaws within 30 days.

¶ 20 We turn now to the merits of the claim. Under the "familiar two-pronged test established in *Strickland* [*v. Washington*], 466 U.S. 668 [(1984),]" to show ineffective assistance of counsel, "a defendant must establish that his counsel's performance fell below an objective standard of reasonableness and that he was prejudiced by counsel's deficient performance." *People v. Brown*, 2017 IL 121681, ¶ 25. That standard applies to a claim that trial counsel was ineffective during the guilty-plea process. *Brown*, 2017 IL 121681, ¶ 26.

> "The first prong of *Strickland* remains the same *** for guilty-plea defendants. [Citation.] For purposes of the second prong, however, a guilty-plea defendant must show

> that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *** [Further, a] conclusory allegation that a defendant would not have pleaded guilty and would have demanded a trial is insufficient to establish prejudice for purposes of an ineffectiveness claim." (Internal quotations marks omitted.) *Brown*, 2017 IL 121681, ¶ 26.

Counsel's performance is measured by "an objective standard of competence under prevailing professional norms." *People v. Evans*, 186 Ill. 2d 83, 93 (1999). Moreover, we apply a "strong presumption that the challenged action or inaction may have been the product of sound trial strategy," and we will not deem counsel to have acted unreasonably unless the defendant overcomes that presumption. *Evans*, 186 Ill. 2d at 93.

¶ 21 Here, defendant has failed to set out a claim under the *Strickland* test. He suggests that counsel unreasonably and capriciously abandoned the suppression motion: "[N]o reasonable attorney would forego a pretrial motion that has a chance of success, resulting in the dismissal of charges, in favor of encouraging the defendant to plead guilty." He further argues that he was clearly prejudiced, as, had the motion succeeded, not only would he have had the defense that the State was unable to prove the charges, but indeed the State likely would have been forced to dismiss the charges. We assume *arguendo* that the petition should be read liberally enough to include this claim despite the petition's focus on the lack of permission for a search. Defendant's arguments nevertheless fail, as he incorrectly assumes that the same offer would have been available to him if his suppression motion had been denied. That assumption is inconsistent with the logic of the State's offer and inconsistent with the record. While defendant's suppression motion was pending, the State offered an agreement under which, instead of facing a Class X felony charge, he would receive the three-year maximum sentence for a Class 4 felony. Further,

based on defendant's suppression motion, it appears that the admissibility of the evidence the police obtained by searching defendant's body was the primary contested matter in this case. Finally, in describing the status of the plea discussion to the court, defense counsel said, "[I]f I reset [the suppression motion], then all offers are off." Only one inference is possible here: the State offered an unusual reduction in the charges in return for defendant's relinquishing his right to contest the admissibility of the State's evidence. Moreover, this was part of an agreement that included the 2005 case.

¶ 22 We conclude that defense counsel did not abandon the suppression motion on a whim or out of carelessness. Instead, the motion's pendency was leverage in the plea negotiations. Because the negotiations encompassed two cases, counsel might reasonably have proposed to abandon the motion even if he believed that its success was an effective certainty. Even if counsel believed that defendant would prevail and so force the State to dismiss this case, abandoning it would have been reasonable if it gained defendant a more favorable disposition in the older case. The presumption of sound trial strategy applies with great force here; we presume that, in advising defendant whether to accept the agreement, counsel weighed the value of proceeding on the suppression motion against the risks of going to trial in *both* cases. Given the circumstances, we need not consider the merits of the suppression motion itself, as we must presume that counsel used the motion's pendency strategically in the plea negotiations.

¶ 23 In any event, the record suggests that the impropriety of the two searches of defendant's body is not as clear-cut as he assumes. It appears that a warrant for defendant's arrest existed in the 2005 case when he was arrested in this case, thus potentially justifying a search of defendant's person as a search incident to arrest. See *People v. Bailey*, 159 Ill. 2d 498, 503

(1994) (a search of an arrestee incident to arrest "is restricted to the person of the arrestee and any area into which the arrestee can reach").

¶ 24 At oral argument, defendant's appellate counsel suggested that defendant's petition might be saved by the assumption that guilty-plea counsel did not inform defendant of the abandonment of the suppression motion as a part of his plea. Indeed, she suggested that defendant might not have been aware that counsel had filed such a motion. The record contradicts the latter suggestion: defendant was present in court when guilty-plea counsel discussed the motion's scheduling. We reject the former suggestion as purely speculative. See *People v. Powers*, 2011 IL App (2d) 090292, ¶ 7 (rejecting as speculative an unsupported claim that, had he been better informed, the defendant would have rejected a plea agreement); see also *People v. Thomas*, 2017 IL App (4th) 150815, ¶ 15 (citing *Powers* to reject as unsupported a claim that the defendant was prejudiced by counsel's confusion over whether the charged conduct would permit day-for-day credit).

¶ 25 III. CONCLUSION

¶ 26 For the reasons stated, we hold that defendant's postconviction petition did not state the gist of a constitutional claim, and we therefore affirm the trial court's first-stage dismissal of that petition. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 27 Affirmed.