2019 IL App (2d) 180894-U
No. 2-18-0894
Order filed October 30, 2019



IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>JOSE L. HERNANDEZ,<br><br>Defendant-Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Circuit Court of Du Page County.<br><br><br><br>No. 14-CF-1268<br><br>Honorable John J. Kinsella, Judge, Presiding. |

PRESIDING JUSTICE BIRKETT delivered the judgment of the court.
Justices Burke and 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 failing to present evidence and that appellate counsel was ineffective for failing to argue that defendant's sentence was disproportionate to his codefendants': trial counsel's choice was clearly reasonable strategy, and defendant and his codefendants were not similarly situated.

¶ 2 Defendant, Jose L. Hernandez, appeals the trial court's order summarily dismissing his postconviction petition. He contends that the petition stated the gist of meritorious claims that trial and appellate counsel were ineffective and that his 20-year sentence was unreasonably disparate to those of his codefendants. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged, along with Luis Hernandez (his father) and Andrew Hernandez (his brother), with unlawful delivery of a controlled substance (720 ILCS 570/401(a)(1)(D) (West 2014)). The State's theory was that defendant served as a lookout while his father and brother completed a drug transaction with a third party.

¶ 5 Evidence at trial showed that three police officers were conducting a stakeout of the house where defendant was staying. They observed defendant and another man drive a Chevrolet Cruze in a circuitous route, making several U-turns. Officer Garrick Amschl opined that this was consistent with a "heat run," a technique drug dealers frequently use to learn whether they are being followed. When defendant and his companion returned, they parked about a block away from the house although parking was available directly in front. Amschl testified that drug dealers often use this technique to avoid disclosing their exact addresses.

¶ 6 Later, defendant drove into an apartment complex in Elgin. He emerged sometime later with his car being followed by a Chevrolet Impala. The two cars drove together to a Walmart in Addison, where they separately entered the parking lot. Defendant parked where he could not directly see the Impala but could see anyone approaching. Another man entered the Impala and emerged carrying a black bag. He then drove away in a red Hyundai. Later, the bag was found to contain seven kilograms of heroin. The Cruze and the Impala drove in tandem to a restaurant in Hanover Park. A subsequent search of the Cruze revealed a hidden compartment. Defendant presented no evidence.

¶ 7 The trial court found defendant guilty. The court found that defendant's actions were consistent with serving as a lookout for a drug transaction. It rejected defendant's suggestion that he was only having a meal with his father and brother and that the latter two completed the drug

sale without his knowledge. In doing so, the court relied on the evidence of defendant's earlier activities, including the heat run.

¶ 8 On direct appeal, defendant argued that he was not proved guilty beyond a reasonable doubt. This court affirmed, rejecting defendant's contention that the activities the officers observed had innocent explanations. *People v. Hernandez*, 2017 IL App (2d) 150731.

¶ 9 Defendant filed a postconviction petition. It included affidavits from defendant, his girlfriend, his father, and his brother. Defendant's affidavit offered a series of innocent explanations for the activities that the witnesses at trial attributed to drug-dealing activity. Defendant's father and brother averred that they conducted the transaction without defendant's knowledge. Defendant alleged that trial counsel was ineffective for failing to introduce any of this evidence.

¶ 10 Defendant also alleged that his 20-year sentence was unreasonably disparate to those of his codefendants, who pleaded guilty in exchange for much shorter terms. Defendant argued that he should not have been punished for maintaining his innocence and exercising his right to trial. Finally, defendant contended that appellate counsel was ineffective for failing to raise this issue on appeal.

¶ 11 The trial court dismissed the petition, finding it patently frivolous and without merit. The court found that the suggestion that trial counsel should have called defendant's family members to bolster his actual-innocence claim was "questionable speculation" and "would likely have had the opposite effect." The court further stated that it considered the evidence in aggravation and mitigation prior to sentencing defendant and that any disparity in the sentences was "justified based on the record in the case." Defendant timely appeals.

¶ 12 II. ANALYSIS

¶ 13 Defendant asserts that his petition stated the gist of meritorious claims of ineffective assistance of trial and appellate counsel and sentencing disparity. The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2018)) permits a defendant to challenge his conviction for violations of his federal or state constitutional rights. *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005). At the first stage of proceedings, the trial court must independently review the postconviction petition within 90 days of its filing and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2018). To survive first-stage review, a petition need set forth only the gist of a constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). To meet this standard, a petition " 'need only present a limited amount of detail' " and hence need not set forth the claim in its entirety. *Id.* (quoting *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996)).

¶ 14 Defendant first contends that trial counsel was ineffective for failing to present any evidence. To establish a claim of ineffective assistance of counsel, a defendant must satisfy the familiar *Strickland* test. See *Strickland v. Washington*, 466 U.S. 668 (1984). A defendant must first establish that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the sixth amendment. *People v. Griffin*, 178 Ill. 2d 65, 73 (1997). To establish a deficiency, a defendant must overcome the strong presumption that the challenged action or inaction was the product of sound trial strategy. *Id.* at 73-74. Decisions about which witnesses to call and what evidence to present are nearly always matters of trial strategy. *People v. Madej*, 177 Ill. 2d 116, 148 (1997). Presenting no evidence at all may be a sound trial strategy. See *People v. Leeper*, 317 Ill. App. 3d 475, 483 (2000).

¶ 15 Here, the State's case against defendant was almost entirely circumstantial, consisting primarily of evidence of his unusual movements prior to and during the drug sale. The officers

who testified opined that these maneuvers were consistent with drug activity. Defense counsel argued, albeit unsuccessfully, that all of defendant's movements could be explained innocently. Defendant now argues that counsel should have presented evidence from defendant and his family members of innocent explanations for the unusual behavior the officers observed. For example, while the police witnesses opined that defendant's driving in a circuitous route, making several U-turns, was consistent with a "heat run," defendant's affidavit asserted that he was helping his brother look for a new apartment. In dismissing the petition, the trial court stated that using the testimony of defendant and his family would not have helped defendant's case and likely would have made it worse.

¶ 16 Under the circumstances, trial counsel made a reasonable strategic choice to present no evidence. Given the circumstantial nature of the State's case and relying as it did on the officers' opinions about the usual practices of drug dealers, counsel could reasonably conclude that it was better to hold the State to its burden of proof beyond a reasonable doubt rather than allow defendant and his family members to attempt to explain away the officers' observations as a sometimes-farfetched series of coincidences. Defendant's father and brother were admitted participants in the drug transaction and defendant had a prior conviction of possession of a controlled substance. Testifying would have subjected them to cross-examination about these and other issues. Thus, as the trial court observed, allowing defendant and his family members to testify would likely have damaged the defense case.[1]

[1] Defendant was admonished that he had the right to decide whether to testify, and he declined. Without elaboration, he faults trial counsel for advising him not to testify, but does not claim that he was coerced or misled into giving up his right to testify.

¶ 17 Defendant makes a confusing argument that trial counsel was ineffective for failing to correct the prosecutor's statement that defendant was previously stopped "at the border," when in fact the stop occurred at a border-patrol checkpoint near Corpus Christi, Texas, which is well north of the United States-Mexico border. Given that the stipulated evidence showed that no drugs were found in defendant's car during the stop, we fail to see how defendant was prejudiced by an incorrect reference to the location of the stop.

¶ 18 Defendant next contends that his 20-year sentence was unreasonably disparate to those of his codefendants. An arbitrary and unreasonable disparity between the sentences of similarly situated codefendants is impermissible. *People v. Stroup*, 397 Ill. App. 3d 271, 273 (2010). "However, fundamental fairness is not violated simply because one defendant is sentenced to a greater term than another." *Id.* While similarly situated defendants should not receive grossly disparate sentences, equal sentences are not required for all participants in the same crime. *People v. Spriggle*, 358 Ill. App. 3d 447, 455 (2005). A sentencing disparity may be justified by differences in the degree of involvement in the crime or in the codefendants' criminal histories, character, or rehabilitative potential. *Stroup*, 397 Ill. App. 3d at 273-74. " 'It is not the disparity that controls, but the reason for the disparity.' " *Id.* at 274 (quoting *Spriggle*, 358 Ill. App. 3d at 455).

¶ 19 We note initially that defendant could have raised this argument on direct appeal but did not, thus forfeiting it. See *People v. Blair*, 215 Ill. 2d 427, 443 (2005). However, defendant claimed that appellate counsel was ineffective for failing to raise this claim. Thus, we consider it. See *People v. Childress*, 191 Ill. 2d 168, 174-75 (2000).

¶ 20 Defendant seeks to compare his sentence to those of his codefendants, both of whom pleaded guilty. In general, "[a] sentence imposed on a codefendant who pleaded guilty as part of

a plea agreement does not provide a valid basis of comparison to a sentence entered after a trial." *People v. Caballero*, 179 Ill. 2d 205, 217 (1997). Thus, on that basis alone, defendant and his codefendants are not similarly situated.

¶ 21 Even if we were to consider the issue further, defendant presents nothing by which we can meaningfully compare his sentence to those of his codefendants. A postconviction petitioner seeking to raise a sentencing-disparity argument must allege facts in support of his claim. *Id.* at 216. Defendant provides no concrete facts about the backgrounds of his codefendants. Indeed, he concedes that he has a prior drug-related conviction but that "nothing in the record shows that factor for the co-defendants." Thus, based on the record, defendant's criminal history merited a more severe sentence. In dismissing defendant's petition, the trial court stated that the disparity in sentences was "justified based on the record in the case," and defendant offers no reason to question that conclusion.

¶ 22 Finally, defendant argues that appellate counsel was ineffective for failing to raise the propriety of using "heat run" evidence. However, defendant does not develop an argument that the State's reliance on heat-run evidence was improper, and he cites no authority for it. See Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018). Defendant apparently attempts to incorporate by reference arguments from his petition for leave to appeal to the Illinois Supreme Court, but this is improper. See *Gruse v. Belline*, 138 Ill. App. 3d 689, 698 (1985) (incorporating by reference other materials in place of argument in brief does not comply with Illinois Supreme Court Rule 341). Thus, we do not consider this argument.

¶ 23 III. CONCLUSION

¶ 24 The judgment of the circuit court of Du Page County is affirmed.

¶ 25 Affirmed.