2019 IL App (4th) 160676-U

NO. 4-16-0676

FILED
October 16, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
KARL I. MACK,	)	No. 13CF44
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas E. Griffith Jr.,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Cavanagh and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: We grant the Office of the State Appellate Defender's motion to withdraw as appellate counsel and affirm the trial court's judgment summarily dismissing defendant's postconviction petition.

¶ 2 This case comes to us on the motion of the Office of the State Appellate Defender (OSAD) to withdraw as appellate counsel on the ground no meritorious issues can be raised on appeal. We grant OSAD's motion and affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 We recently addressed the factual background of defendant's criminal case in *People v. Mack*, 2018 IL App (4th) 160121-U, ¶¶ 3-23. Only those facts necessary for this appeal are set forth.

¶ 5 A. Information

¶ 6 In January 2013, the State charged defendant, Karl I. Mack, by information with three offenses following an incident where a firearm was discharged in Macon County on the night of January 5, 2013: (1) unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2012)) (count I); (2) defacing identification marks of a firearm (720 ILCS 5/24-5(b) (West 2012)) (count II); and (3) aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2012)) (count III). In count I, the State alleged defendant, who had been convicted of a felony, knowingly possessed a firearm on or about his person. In count III, the State alleged defendant knowingly discharged a firearm in the direction of a vehicle he knew was occupied.

¶ 7 B. Defendant's Jury Trial and Sentence

¶ 8 In August 2015, defendant's case proceeded to a jury trial. Constance Wilson, the State's key witness, identified defendant as the man she saw exit an upstairs apartment, located at 1038 East Wood Street, firing a weapon. Wilson testified she observed defendant arguing with a man who arrived at the apartment in a pickup truck. Defendant walked into the apartment momentarily and walked out with a weapon. Wilson testified defendant shot in the direction of the man in the truck. Durrell Jackson, defendant's witness, confirmed the shooting occurred from the entrance to the upstairs apartment at 1038 East Wood Street, which is where defendant and the weapon were subsequently located. Robert Berk, a trace evidence analyst with the Illinois State Police, testified gunshot particles were found on defendant's hand, meaning defendant "had either discharged a firearm, had contacted an item that had primer gunshot residue on it, or that his left hand was in the environment of a firearm when it was discharged."

¶ 9 Defendant testified he was at the apartment of Michael Thompson (who was also referred to at trial as Michael Thomas) with his girlfriend at the time of the shooting. At approximately 11:20 p.m., Wilson, with whom defendant had "relations," began banging on the

door. Defendant did not open the door because he did not want "that girl beating up the girl I was with" and it was not his residence. Wilson left after approximately ten minutes. A few minutes after Wilson left, defendant testified Thomas went downstairs and returned "in a rage." Not long after Thomas's return, the police banged on the door. Defendant testified he did not answer the door because Thomas threatened him.

¶ 10 Following presentation of the evidence, the jury returned a verdict of guilty on the charge of unlawful possession of a weapon by a felon and not-guilty verdicts on the charges of aggravated discharge of a firearm and defacing identification marks of a firearm.

¶ 11 On February 3, 2016, the trial court sentenced defendant to 66 months' imprisonment. Defendant appealed.

¶ 12 C. Direct Appeal

¶ 13 Defendant raised the following relevant arguments on direct appeal: "(1) the evidence is insufficient to prove him guilty of unlawful possession of a weapon by a felon beyond a reasonable doubt; *** [(2)] the trial court improperly barred him from impeaching a witness for an aggravated-battery conviction; and [(3)] the court improperly admitted hearsay testimony." *Mack*, 2018 IL App (4th) 160121-U, ¶ 2.

¶ 14 This court affirmed the trial court's judgment. *Id.* ¶ 65. We held (1) the evidence was sufficient to convict him of unlawful possession of a weapon by a felon, (2) the trial court did not err in barring him from impeaching a witness, and (3) the trial court erred in allowing hearsay testimony, but the error was harmless. *Id.* ¶ 1.

¶ 15 D. Postconviction Proceedings

¶ 16 On May 27, 2016, during the pendency of his direct appeal, defendant filed a *pro se* postconviction petition. He raised nine ineffective-assistance-of-counsel claims and also

argued (1) the trial court erred in barring him from impeaching a witness with a prior felony conviction, (2) the court erred in allowing hearsay testimony, and (3) the State failed to prove him guilty of unlawful possession of a weapon by a felon beyond a reasonable doubt.

¶ 17 On August 23, 2016, the trial court summarily dismissed defendant's petition. The court noted defendant raised many of the claims in his petition on direct appeal, he only attached "a tax bill and public health record" to his petition, and the claims not supported "by affidavits, records, or other evidence" were "mere conclusions which have no basis in fact." The court further found no error in allowing the hearsay testimony or in barring defendant from impeaching a witness with a prior felony conviction.

¶ 18 Defendant appealed the trial court's summary dismissal of his postconviction petition, and OSAD was appointed to represent him on appeal. In February 2019, OSAD moved to withdraw as counsel on appeal. We granted defendant leave to file a response to OSAD's motion on or before March 13, 2019, which he did not do.

¶ 19 II. ANALYSIS

¶ 20 OSAD contends no meritorious argument can be made the trial court erred in summarily dismissing defendant's postconviction petition. We agree.

¶ 21 A. The Post-Conviction Hearing Act

¶ 22 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2014)) provides a three-stage procedure for criminal defendants to collaterally attack their convictions based on a substantial denial of their constitutional rights. *People v. Hodges*, 234 Ill. 2d 1, 9, 912 N.E.2d 1204, 1208 (2009). A defendant commences proceedings under the Act by filing a petition both verified by affidavit (725 ILCS 5/122-1(b) (West 2014)) and supported by "affidavits, records, or other evidence" (725 ILCS 5/122-2 (West 2014)).

¶ 23 At the first stage of proceedings, the trial court must, within 90 days and without seeking or relying on input from the State, summarily dismiss the petition if it determines the petition is frivolous or patently without merit, meaning "the petition has no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 12; see also 725 ILCS 5/122-2.1(a)(2) (West 2014) and *People v. Gaultney*, 174 Ill. 2d 410, 419, 675 N.E.2d 102, 107 (1996). The trial court may also summarily dismiss the petition if the defendant fails "to either attach the necessary 'affidavits, records, or other evidence' or explain their absence" (*People v. Collins*, 202 Ill. 2d 59, 66, 782 N.E.2d 195, 198 (2002) (quoting *People v. Turner*, 187 Ill. 2d 406, 414, 719 N.E.2d 725, 730 (1999))), or if the petition simply alleges "nonfactual and nonspecific assertions that merely amount to conclusions ***." *People v. Morris*, 236 Ill. 2d 345, 354, 925 N.E.2d 1069, 1075 (2010).

¶ 24 Issues adjudicated on direct appeal are barred by *res judicata*. *People v. Tate*, 2012 IL 112214, ¶ 8, 980 N.E.2d 1100. We review the summary dismissal of a postconviction petition *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶ 25 We initially note we agree OSAD can raise no meritorious argument the trial court erred on procedural grounds. The trial court dismissed defendant's petition within 90 days (here, 88 days) and neither sought nor relied on input from the State. See 725 ILCS 5/122-2.1(a)(2) (West 2014). See also *Gaultney*, 174 Ill. 2d at 419.

¶ 26 B. Defendant's Ineffective-Assistance-of-Counsel Claims

¶ 27 Ineffective-assistance-of-counsel claims are reviewed under the two-pronged standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). "At the first stage of postconviction proceedings under the Act, 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." *Hodges*, 234 Ill. 2d at 17. "[B]road conclusory allegation[s] of ineffective assistance of counsel *** are not allowed under the Act." *People v. Delton*, 227 Ill. 2d 247, 258, 882 N.E.2d 516, 522 (2008). Ineffective-assistance-of-counsel claims alleging "trial counsel failed to investigate and call a witness must be supported by an affidavit from the proposed witness." *People v. Enis*, 194 Ill. 2d 361, 380, 743 N.E.2d 1, 13 (2000). "In the absence of such an affidavit, *** further review of the claim is unnecessary." *Id.* We "may resolve ineffectiveness claims under the two-part *Strickland* test by reaching only the prejudice component, for lack of prejudice renders irrelevant the issue of counsel's performance." *People v. Coleman*, 183 Ill. 2d 366, 397-98, 701 N.E.2d 1063, 1079 (1998).

¶ 28 1. *Counsel's Failure to Investigate and Present Evidence*

¶ 29 Defendant claims trial counsel was ineffective for failing to: (1) present evidence he did not live at the apartment in which the weapon was recovered; (2) present evidence Wilson threatened to " 'get even' " with him less than one month prior to the shooting; (3) interview "Erica Brewer and the [two] other subjects whom lived and visited 1038 East Wood"; (4) investigate and present evidence Michael Thomas was the shooter; and (5) present evidence the area in which the shooting occurred was "very dark thus impeding [Wilson's] eye sight and limit[ing] her ability to make a positive I.D."

¶ 30 a. Different Address

¶ 31 Defendant argues counsel was ineffective for failing to present evidence he did not live at the apartment in which the weapon was recovered (*i.e.*, 1038 East Wood Street). He attached to his postconviction petition a property tax bill and an Illinois Department of Public Health printout, which both list his address as 621 Martin Luther King, Jr., Drive.

¶ 32 It is not arguable defendant was prejudiced. Defendant presented evidence at trial he did not live at 1038 East Wood Street, and the State presented evidence establishing defendant's possession of the weapon independent of his residence. Defendant testified he did not live at 1038 East Wood Street and he had only been to that apartment on one prior occasion. Wilson testified she observed defendant arguing with a man who arrived at the apartment in a pickup truck. Defendant walked into the apartment momentarily and walked out with a weapon. Wilson testified defendant shot in the direction of the man in the truck. Robert Berk testified gunshot particles were found on defendant's hand, meaning defendant "had either discharged a firearm, had contacted an item that had primer gunshot residue on it, or that his left hand was in the environment of a firearm when it was discharged."

¶ 33 b. Constance Wilson's Threat

¶ 34 Defendant argues counsel was ineffective for failing to "interview neighbors, friends and family members to expose [Wilson] as threatening to 'get even' with [him] less than one month before the [offense occurred]." Defendant neither identified the proposed witnesses, nor did he attach an affidavit from them. "In the absence of such an affidavit, *** further review of the claim is unnecessary." *Enis*, 194 Ill. 2d at 380; see also *Collins*, 202 Ill. 2d at 66.

¶ 35 c. Erica Brewer "and the Other Subjects"

¶ 36 Defendant argues counsel was ineffective for failing to interview "Erica Brewer and the [two] other subjects whom lived and visited 1038 East Wood." Defendant did not attach an affidavit from Brewer and he did not identify the "other subjects." See *Enis*, 194 Ill. 2d at 380. See also *Collins*, 202 Ill. 2d at 66.

¶ 37 d. Michael Thomas

¶ 38 Defendant raised three ineffectiveness claims related to counsel's failure to investigate and present evidence Michael Thomas was the shooter: (1) counsel should have presented evidence Thomas lived at 1038 East Wood Street, (2) counsel should have requested the weapon be tested for fingerprints; and (3) counsel should have subpoenaed Thomas to compare the clothing Thomas wore to what the shooter wore.

¶ 39 Defendant's first claim is meritless because multiple people testified Thomas lived at 1038 East Wood Street and any additional evidence presented by counsel establishing this point would have merely been cumulative and could not arguably have changed the outcome. Defendant's second claim is meritless because he simply speculates that if "Thomas' fingerprints were on the firearm *** the jury would have returned a different finding" but fails to allege his fingerprints were in fact on the firearm or provide any support for such an allegation. See *Delton*, 227 Ill. 2d at 258 ("[B]road conclusory allegation[s] of ineffective assistance of counsel *** are not allowed under the Act."). See also *Morris*, 236 Ill. 2d at 354 ("[N]onfactual and nonspecific assertions that merely amount to conclusions will not survive summary dismissal under the Act."). Defendant's final claim is also meritless because he again speculates "[i]t is possible Ms. Wilson in the low light of the night identified the clothing but misidentified whom was wearing them" but fails to allege Thomas was in fact wearing the clothing Wilson described at the time of the incident or provide any support for such an allegation. See *Delton*, 227 Ill. 2d at 258. See also *Morris*, 236 Ill. 2d at 354.

¶ 40 e. The Area Was Dark

¶ 41 Defendant argues counsel was ineffective for failing to investigate and present evidence the area in which the shooting occurred was "very dark thus impeding [Wilson's] eye sight and limit[ing] her ability to make a positive I.D."

¶ 42 It is not arguable defendant was prejudiced. There was no dispute the incident occurred at approximately 11:30 p.m., and the jury heard testimony it was dark outside. When asked to describe the weapon on direct examination, Wilson stated, "It was black, and I'm not sure of size or length, but it was dark. You have to remember it is 11:30 at night[.]" On cross-examination, Wilson had the following exchange with defense counsel:

"Q. So this occurred approximately 11:20 at night; is that right?

A. Yes, sir.

Q. Obviously, dark outside?

A. Yes, sir."

¶ 43 2. *Counsel's Failure to Object to Inconsistent Verdicts*

¶ 44 Defendant claims trial counsel was ineffective for failing to object to his conviction on count I—unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2012))—on the basis it was legally inconsistent with an acquittal on count II—defacing identification marks of a firearm (720 ILCS 5/24-5(b) (West 2012)).

¶ 45 It is not arguable defendant was prejudiced, as "defendants in Illinois can no longer challenge convictions on the sole basis that they are legally inconsistent with acquittals on other charges." *People v. Jones*, 207 Ill. 2d 122, 133-34, 797 N.E.2d 640, 647 (2003).

¶ 46 3. *Counsel's Failure to Object at Sentencing*

¶ 47 Defendant claims trial counsel was ineffective for failing to object to the State's request at sentencing that the trial court "take judicial notice of the testimony at trial, including testimony related to the *other two charges*." (Emphasis in original.)

¶ 48 It is not arguable defendant was prejudiced. "It is well established that 'evidence of criminal conduct can be considered at sentencing even if the defendant previously had been

acquitted of that conduct.' " *People v. Deleon*, 227 Ill. 2d 322, 340, 882 N.E.2d 999, 1009 (2008) (quoting *People v. Jackson*, 149 Ill. 2d 540, 549, 599 N.E.2d 926, 930 (1992)).

¶ 49 C. Defendant's Claims Raised on Direct Appeal

¶ 50 Defendant claims the trial court erred by (1) allowing hearsay statements to explain police investigatory conduct and (2) barring him from impeaching Wilson based on a prior felony conviction. He also argues the State failed to prove him guilty of unlawful possession of a weapon by a felon beyond a reasonable doubt.

¶ 51 Defendant's claims were adjudicated on direct appeal and are therefore barred by *res judicata*. See *Mack*, 2018 IL App (4th) 160121-U and *Tate*, 2012 IL 112214, ¶ 8. On direct appeal, we held (1) the "trial court's error in allowing hearsay statements to explain police investigatory conduct [wa]s harmless[,]" (2) the "trial court did not err in barring defendant from impeaching [Wilson] based on an [eight]-year old felony conviction," and (3) the "evidence [wa]s sufficient to convict defendant of unlawful possession of a weapon by a felon ***." *Mack*, 2018 IL App (4th) 160121-U, ¶ 1.

¶ 52 III. CONCLUSION

¶ 53 For the reasons stated, we grant OSAD's motion for leave to withdraw as counsel and affirm the trial court's judgment.

¶ 54 Affirmed.