2014 IL App (4th) 121080-U

NO. 4-12-1080

FILED
May 15, 2014
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RICHARD L. CARR, JR., Defendant-Appellant.	) Appeal from) Circuit Court of) Adams County) No. 06CF223)) Honorable) Mark A. Drummond,) Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Knecht and Turner concurred in the judgment.

ORDER

¶ 1 *Held:* Because no meritorious issue can be raised on appeal, we allow OSAD's motion to withdraw as counsel on appeal pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and affirm the trial court's second-stage dismissal of defendant's postconviction petition.

¶ 2 In December 2007, defendant Richard Carr was convicted of two counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2004)) and two counts of criminal sexual assault (720 ILCS 5/12-13(a)(2) (West 2004)). Defendant was also acquitted of two counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2004)) and criminal sexual assault (720 ILCS 5/12-13(a)(2) (West 2004)). On March 28, 2011, defendant, by counsel, filed a petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2010). On December 14, 2011, the State filed a motion to dismiss the petition. On November 2, 2012, the trial court dismissed the petition. Defendant appealed, and the office of

the State Appellate Defender (OSAD) was appointed to represent him on appeal. OSAD has since filed a motion to withdraw as counsel on appeal pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), because any request for relief would be without merit. This court gave defendant the opportunity to file additional points and authorities. Defendant failed to do so. We grant OSAD's *Finley* motion and affirm the dismissal of defendant's postconviction petition.

¶ 3 I. BACKGROUND

¶ 4 In April 2006, the State charged defendant with one count of criminal sexual assault (720 ILCS 5/12-13(a)(2) (West 2004)) and one count of aggravated criminal sexual abuse (720 ILCS 5/12-16 (West 2004)). In October 2007, the State filed an eight-count amended information charging defendant with four counts of criminal sexual assault (720 ILCS 5/12-13(a)(2) (West 2004)), and four counts of aggravated criminal sexual abuse (720 ILCS 5/12-16 (West 2004)).

¶ 5 At defendant's trial in December 2007, L.S. testified she was walking to the junior high where she attended school. Defendant, who was in a car, began talking to her. Defendant asked if she wanted to help him celebrate his birthday. L.S. testified she told defendant she was 14 years old. However, she agreed to go with defendant in his car.

¶ 6 Defendant drove to a County Market in Quincy and asked L.S. what she liked to drink. He then went into the store by himself and was gone for 15 to 25 minutes. Defendant came out of the store with a bottle of McCormick's Vanilla Vodka hidden under his coat. Defendant then drove L.S. to his grandmother's apartment on Hampshire Street in Quincy. Two other men were inside the apartment. Defendant told L.S. to go up a ladder to a loft while he went into the kitchen and made some drinks with the vodka and Mountain Dew. L.S. testified she started feeling dizzy after drinking two or three of the drinks.

¶ 7 According to L.S., defendant took off her clothes and then his own. He performed oral sex on her and told L.S. she had to perform oral sex on him, which she did. Defendant then had vaginal intercourse with L.S. L.S. testified defendant then rolled her onto her stomach because she was too drunk to move and penetrated her anally. L.S. testified she could not think because of the alcohol. L.S.'s trial testimony was inconsistent with her initial report to the police, where she told the police she did not remember any details because she was passed out at the time of the sexual activity.

¶ 8 The State introduced deoxyribonucleic acid (DNA) evidence recovered from an examination of L.S. The probability of semen recovered from a vaginal swab being from someone other than defendant was one in 240 quintillion.

¶ 9 Defendant testified he did have sex with L.S., but he thought she was older than 17 and a student at John Wood Community College. According to defendant, she got into his car voluntarily. He asked her what she liked to drink, and she said vodka. She stayed in the car by herself while he went inside County Market and stole a fifth of vanilla vodka.

¶ 10 According to defendant, he and L.S. then went to the loft area of Mary Campbell's apartment and drank some of the vodka. After 15 or 20 minutes, they started kissing and then had sexual intercourse, which did not last long because L.S. complained of having a stomach issue because of medication she was taking. Defendant denied any oral or anal sex took place. Defendant testified L.S. never passed out, she was responsive during the sex act, and she never said "no." According to defendant, they were in the loft area for about an hour and 45 minutes and drank about half of the fifth of vodka.

¶ 11 Defendant testified he and L.S. left the apartment at about 11 a.m. He started driving toward John Wood Community College when L.S. said he was going the wrong way

because she needed to go to the junior high school. Defendant became nervous and asked why she needed to go the junior high school. She said she needed to get her younger brother.

¶ 12 The next morning, according to defendant, Detective Matt Hermsmeier came to defendant's door and told him he had probable cause to arrest defendant for stealing the vodka. At the police station, defendant denied having any contact with L.S. because he was afraid. Defendant testified he only learned L.S. was 14 when Detective Hermsmeier told him.

¶ 13 Defendant was convicted of the counts of criminal sexual assault (counts I and II) and aggravated criminal sexual abuse (counts V and VI) alleging vaginal and anal penetration. He was acquitted of the allegations involving oral sex. In February 2008, the trial court sentenced defendant to two consecutive 15-year terms of imprisonment on the two criminal sexual assault charges to be served concurrently with two 7-year terms on the aggravated criminal sexual abuse charges. In April 2008, the court found the aggravated criminal sexual abuse charges merged with the two criminal sexual assault charges.

¶ 14 In his direct appeal, defendant argued his right to counsel of his choice was violated when the trial court refused to grant a two-month continuance for defendant's retained lawyer to return to work after an illness. *People v. Carr*, No. 4-08-0286 (Oct. 29, 2009) (unpublished order under Supreme Court Rule 23). This court affirmed defendant's conviction, holding the trial court did not abuse its discretion by denying defendant's motion to continue. *Id.*

¶ 15 On March 28, 2011, defendant, with the assistance of counsel, filed the petition for postconviction relief at issue in this appeal. All of the allegations could have been raised in defendant's direct appeal. However, he argues his appellate counsel was ineffective for not raising the issues.

¶ 16 On December 14, 2011, the State filed a motion to dismiss defendant's petition. The State argued:

> "The Petition for Post-Conviction Relief and the accompanying Affidavit of Richard Carr, presently before the Court, make no showing let alone a substantial showing, that the constitutional rights of the defendant were violated. *** There is no argument presented as to how any one of those forty-seven (47) issues would have made a difference in the outcome of the trial. The defendant has not met the burden of the first-prong test of *Strickland* which was to show that appellate counsel's failure to raise any of the forty-seven (47) issues in the direct appeal fell below an objective standard of reasonableness. We should not even get to argument on the second prong test of *Strickland* whether there is a 'reasonable probability that, but for this substandard performance, the result of the proceedings would have been different.' "

¶ 17 In November 2012, following a hearing, the trial court filed a thorough 19-page written opinion granting the State's motion to dismiss. The court noted appellate counsel is not required to brief every conceivable issue on appeal and is not ineffective for not raising issues counsel believes are meritless. Further, the court noted even if appellate counsel raised all of the issues defendant raised in his postconviction petition, no reasonable probability existed the result in defendant's case would have been any different. According to the court, "The evidence against the defendant was overwhelming. Stated bluntly, the defendant picked up a 14-year-old

girl walking to school, got her drunk on cheap, flavored vodka which he had stolen, had sex with her and then, at trial, tried to blame her."

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 At issue in this appeal is whether the trial court erred in granting the State's motion to dismiss defendant's postconviction petition during the second stage of postconviction proceedings. We review the second stage dismissal of a postconviction petition *de novo*. *People v. Pendleton*, 223 Ill. 2d 458, 473, 861 N.E.2d 999, 1008 (2006).

¶ 21 Relief under the Act is limited to constitutional deprivations that occurred in the original trial court proceedings. *People v. Evans,* 186 Ill. 2d 83, 89, 708 N.E.2d 1158, 1161 (1999). The Act also specifies any claim that was raised or could have been raised on direct appeal cannot be raised in a postconviction petition. *Id.*

¶ 22 Defendant filed a direct appeal and only argued he was denied his choice of counsel where the trial court denied a continuance that may have allowed his original counsel to recover from an illness and represent him at trial. This court found the trial court did not abuse its discretion in denying defendant's motion to continue. *People v. Carr*, No. 4-08-0286 (Oct. 29, 2009) (unpublished order under Supreme Court Rule 23). Defendant raised this issue again in his postconviction petition. However, this issue is barred by the doctrine of *res judicata* from being considered in this postconviction petition. See *People v. Pitsonbarger*, 205 Ill. 2d 444, 456, 793 N.E.2d 609, 619 (2002).

¶ 23 As stated earlier, the other issues defendant raises in his postconviction petition could have been raised in his direct appeal. As a result, defendant normally would be barred from raising these issues in a postconviction petition. See *Id.* Defendant attempts to avoid

forfeiture by alleging his appellate counsel provided ineffective assistance of counsel by not raising these issues in his direct appeal.

¶ 24 However, appellate counsel is not required to raise every conceivable issue on appeal. *People v. Richardson*, 189 Ill. 2d 401, 412, 727 N.E.2d 362, 370 (2000). Counsel's decision as to what issues to raise on appeal will not be questioned unless the decision "was patently wrong." *Id.* Our supreme court has made clear to succeed on a claim of ineffective assistance of appellate counsel, a petitioner must show his appellate counsel's failure to raise an issue "was objectively unreasonable and that, but for this failure, defendant's conviction or sentence would have been reversed." *Id.* Defendant's claims fail to meet this high threshold.

¶ 25 This petition was not summarily dismissed during the first stage of postconviction proceedings. As a result, defendant's petition needed to state more than the gist of a constitutional claim to survive the State's motion to dismiss. See *People v. Coleman*, 183 Ill. 2d 366, 381, 701 N.E.2d 1063, 1072 (1998). Instead, a defendant must make a substantial showing of a constitutional violation. *Id.* A defendant cannot rely on conclusory allegations to establish a substantial showing of a constitutional violation. *Id.* According to our supreme court, "Nonfactual and nonspecific assertions which merely amount to conclusions are not sufficient to require a hearing under the Act." *Id.*

¶ 26 In this case, defendant's petition argued his appellate counsel was ineffective for not raising in his direct appeal a multitude of issues, including the following: (1) 13 allegedly erroneous pretrial rulings by the trial court; (2) 25 allegedly erroneous trial rulings; (3) 2 allegedly erroneous rulings admitting specific evidence and 1 general allegation regarding unspecified exhibits; (4) the sufficiency of the evidence to convict defendant based on inconsistencies in the initial statements and testimony of L.S.; (5) the trial court's allegedly

erroneous refusal to give an accomplice jury instruction; and (6) the ineffectiveness of trial counsel because of counsel's failure to adequately prepare the motion for a change of venue and failure to object to DNA evidence. With the exception of defendant's argument his trial counsel was ineffective, it appears most of these issues were simply copied from defendant's posttrial motion.

¶ 27 The vast majority of petitioner's claims in his postconviction petition are conclusory and do not make a substantial showing of a constitutional violation. Only two of defendant's claims even merit mention because they actually include some factual allegations. First, defendant argued his appellate counsel was ineffective for not making an argument pursuant to *Batson v. Kentucky,* 476 U.S. 79 (1986), where the trial court allowed the State to use a peremptory challenge to dismiss the only African-American individual in the jury venire. Second, defendant argued his appellate counsel was ineffective for not making an argument with regard to the sufficiency of the evidence to convict.

¶ 28 The record in this case clearly rebuts any claim defendant was prejudiced by his appellate counsel's failure to make these two arguments. See *Coleman,* 183 Ill. 2d at 382, 701 N.E.2d at 1072 ("this court has consistently upheld the dismissal of a post-conviction petition when the allegations are contradicted by the record from the original trial proceedings"). With regard to the dismissal of the juror, although the trial court's written opinion dismissing defendant's petition reflects the State used a peremptory challenge to dismiss the juror, the record shows the trial court dismissed the juror for cause. The juror had been charged with aggravated battery as a result of an incident involving a Quincy police officer. The State noted he had later entered a guilty plea to a misdemeanor in exchange for his agreement not to file charges against the Quincy police department. At the time of defendant's trial, the potential juror was still

serving a term of supervision. The State noted it was concerned with animosity the potential juror would have with both the State's Attorney and the Quincy police department. Further, at most, the individual in question would have only served as an alternate juror. No alternate jurors were used during the trial.

¶ 29 As for appellate counsel's failure to argue the sufficiency of the evidence to convict defendant, the record implicitly shows defendant was convicted based on the jury's findings with regard to his and L.S.'s credibility. The alleged victim testified she told defendant she was 14 years old and did not consent to the charged sexual acts. Defendant claimed he believed the alleged victim was over the age of 17 and only had consensual vaginal intercourse. The jury obviously chose to believe at least part of the alleged victim's versions of the events in question.

¶ 30 A court of review will not reverse a conviction based on the sufficiency of the evidence unless no reasonable trier of fact could have convicted a defendant based on the evidence in that case. *People v. Cunningham*, 212 Ill. 2d 274, 278, 818 N.E.2d 304, 307 (2004). Based on the record in this case, a rational trier of fact could have convicted defendant.

¶ 31 Because the vast majority of claims defendant raised in his postconviction petition are simply conclusory and the claims that are not mere conclusions are contradicted by the record in this case, we grant OSAD's motion to withdraw as counsel on appeal and affirm the trial court's dismissal of defendant's postconviction petition.

¶ 32 III. CONCLUSION

¶ 33 For the reasons stated, we affirm the trial court's dismissal of defendant's postconviction petition.

¶ 34 Affirmed.