2024 IL App (4th) 231494-U

NO. 4-23-1494

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
July 25, 2024
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Henry County
THOMAS D. SCHAEFER,	)	No. 12CF300
Defendant-Appellant.	)	
	)	Honorable
	)	Colby G. Hathaway,
	)	Judge Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Steigmann and Lannerd concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court granted appellate counsel's motion to withdraw and affirmed the trial court's judgment, concluding no meritorious issue could be raised on appeal.

¶ 2 In April 2016, a jury found defendant, Thomas D. Schaefer, guilty of one count of unlawful production and one count of unlawful possession of more than 50 but less than 200 cannabis sativa plants (720 ILCS 550/8(d) (West 2012)). The unlawful possession conviction merged into the unlawful production conviction. Defendant was sentenced to 30 months' probation on the latter. Defendant's convictions and sentence were affirmed on direct appeal.

¶ 3 Defendant filed a postconviction petition, alleging (1) he was denied the right to argue for the disclosure of the confidential source used for the search warrant affidavit and (2) his counsel was ineffective for failing to challenge the warrant for lack of probable cause. The trial court granted the State's motion to dismiss, finding (1) defendant had the opportunity at

the pretrial suppression hearing to argue for the disclosure of the confidential source and (2) he failed to make a substantial showing of a constitutional violation. Defendant appealed, and counsel was appointed to represent him.

¶ 4 Counsel now seeks to withdraw, contending any argument would be meritless. Defendant has filed a response. We grant counsel's motion to withdraw and affirm the trial court's judgment.

¶ 5 I. BACKGROUND

¶ 6 A. Defendant's Charges

¶ 7 On September 4, 2012, the State charged defendant by information with (1) one count of unlawful production of more than 200 cannabis sativa plants (720 ILCS 550/8(e) (West 2012)), (2) one count of possession of more than 30 but not more than 500 grams of cannabis (*id.* § 4(d)), and (3) one count of possession with intent to deliver more than 30 but not more than 500 grams of cannabis (*id.* § 5(d)). On April 20, 2016, the State charged defendant by amended information with one count of unlawful production and one count of unlawful possession of more than 50 but less than 200 cannabis sativa plants (*id.* § 8(d)). The charges stemmed from a cannabis growing operation defendant conducted in the basement of his house.

¶ 8 B. The Pretrial Proceedings

¶ 9 Through his first attorney, Anjali Dooley, defendant filed a motion to disclose the identity of the confidential source used for the search warrant affidavit and a motion to quash the warrant and suppress evidence. Dooley later withdrew, and attorney Charles Schierer entered his appearance. Defendant filed a motion for a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), alleging statements made by Kewanee police officer Shawn Lay in the warrant affidavit were knowingly false or were made with reckless disregard for the truth.

¶ 10 At the August 21, 2014, *Franks* hearing, Schierer argued defendant could not prove alleged hearsay statements in the warrant affidavit were false because the statements were "somebody told me that somebody told me" and defendant "doesn't even know who the confidential source is. That's not been disclosed to us, so from that standpoint, [we] can't possibly disprove Paragraph 3, you know, by showing that it's false, because we don't even know who it is." Additionally, Schierer argued Lay demonstrated reckless disregard for the truth by failing to adequately inform the judge who granted the warrant about "the confidential source's history and track record," thereby preventing the judge from assessing his credibility.

¶ 11 The trial court denied defendant's motion to quash the warrant and suppress evidence. The court explained:

> "Okay. Defense has the burden of proof. I find that the defendant has failed to prove by a preponderance of the evidence that the affiant lied or showed a reckless disregard for the truth of the facts listed in said affidavit.
>
> As I see the search warrant, basically, he had eyewitness testimony that there were—there was an illegal grow operation at [defendant's house], and the police officer put in the affidavit various corroborating facts to corroborate the eyewitness testimony. And to say that he didn't go far enough, I agree with the State. You can always go further, but this was for probable cause, and so, motion denied."

¶ 12 Schierer withdrew after the *Franks* hearing, and attorney Maureen Williams entered her appearance. Defendant filed an amended motion to suppress evidence, raising a chain of custody issue, which the State moved to dismiss. The State argued motions to suppress

evidence seized pursuant to a warrant are limited to, *inter alia*, claims relating to the deficiency of the warrant. According to the State's argument, because the trial court affirmed the validity of the warrant by way of the *Franks* hearing, defendant was estopped from further arguing it was invalid. The State also contended defendant's attempt to suppress evidence based on a chain of custody issue was improper, as that issue should be raised during trial.

¶ 13 On December 4, 2015, the trial court denied defendant's amended motion. The court noted chain of custody issues "are evidentiary objections, and they don't go to suppression. They go to inadmissibility." Williams then raised the motion for disclosure of the confidential source and contended the confidential source may not even exist. The court denied this motion, explaining defendant had the opportunity to argue the nonexistence of the confidential source at the *Franks* hearing.

¶ 14 C. Defendant's Convictions and Sentence

¶ 15 On April 27, 2016, the jury found defendant guilty of both charges of the amended information. Thereafter, Williams withdrew, and attorney William Loeffel entered his appearance. Defendant filed a motion for a new trial, which the trial court denied. At the December 16, 2016, sentencing hearing, the court merged the unlawful possession conviction into the unlawful production conviction and sentenced defendant to 30 months' probation.

¶ 16 D. Defendant's Direct Appeal

¶ 17 On direct appeal, defendant argued all four of his attorneys provided ineffective assistance by failing to challenge the warrant for lack of probable cause. The Third District affirmed defendant's convictions and sentence, holding that "[t]he record belies this contention." *People v. Schaefer*, 2019 IL App (3d) 170015-U, ¶¶ 26, 42. The court found defendant "trie[d]

and fail[ed] to separate the purpose of a *Franks* hearing from probable cause." *Id.* The court explained:

> "If, at the conclusion of a *Franks* hearing, the trial court denies a defendant's motion to suppress, it has reaffirmed the initial grant of the warrant for probable cause. A *Franks* hearing goes directly toward the presence or absence of probable cause. The trial court's ruling in this case reflects the same. ***
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> None of defendant's four attorneys failed to challenge the search warrant for lack of probable cause. Dooley filed the motion to suppress. Schierer argued the motion. Williams attempted to file another motion to suppress but the court indicated it would not hear the motion. Loeffel raised the denial of the motion to suppress in his posttrial motion. Trial counsel cannot be ineffective for failing to take action when the record demonstrates all four attorneys took affirmative action on the matter. Therefore, we do not find error." *Id.* ¶¶ 27-28.

¶ 18 E. Defendant's Postconviction Petition

¶ 19 On June 7, 2019, defendant filed a *pro se* petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2018)). The trial court dismissed the petition as untimely. On October 15, 2020, the Third District ordered the court to vacate its dismissal and conduct second-stage proceedings. On June 28, 2023, defendant filed two further motions titled "Petition for Post-Conviction Relief," adding claims to his original postconviction petition. Defendant argued (1) Schierer was "negligent and inadequate" for failing to "present several key facts to defend against a corrupt search warrant" and (2) defendant was denied the right to argue

for the disclosure of the confidential source. The State moved to dismiss defendant's petition. The State argued (1) the Third District previously concluded defendant's counsel was not ineffective and (2) his petition did not contain any "new allegations of ineffectiveness" or "new evidence or information."

¶ 20 On November 7, 2023, the trial court held a second-stage hearing on defendant's postconviction petition. The court noted probable cause for the warrant was "well litigated" through both the pretrial and posttrial motions and on direct appeal. The court noted "[t]he record in this case directly contradicts" the proposition defendant was denied the right to argue for the disclosure of the confidential source. The court explained, "There was a motion for disclosure for [*sic*] confidential source filed. It was heard. It was decided by the Court on December 4th of 2015. So [defendant] did have the opportunity to argue that in the Trial Court." The court found defendant failed to make a substantial showing of a constitutional violation and granted the State's motion to dismiss.

¶ 21 This appeal followed.

¶ 22 II. ANALYSIS

¶ 23 On appeal, counsel moves for leave to withdraw. Counsel supports her motion with a memorandum stating she considered raising the following issues on defendant's behalf: (1) whether the trial court properly denied defendant's claim he was denied the right to argue for the disclosure of the confidential source and (2) whether the court properly denied his claim his attorneys were ineffective for failing to challenge the warrant for lack of probable cause. Counsel explains why she concluded neither of these issues has arguable merit. Defendant filed a response, alleging the court "did everything in [its] power to not allow [him] a fair court proceeding." After examining the record, we agree with counsel that no meritorious issue can be

raised on appeal. We therefore grant counsel's motion to withdraw and affirm the court's judgment.

¶ 24 The Act "provides a tool for criminal defendants to assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both." *People v. House*, 2021 IL 125124, ¶ 15, 185 N.E.3d 1234. There are three stages of postconviction proceedings. At the first stage, the court reviews the petition independently to "determine whether it is 'frivolous or *** patently without merit.' " *Id.* ¶ 16 (quoting 725 ILCS 5/122-2.1(a)(2) (West 2008)). If the court does not summarily dismiss the petition, the matter proceeds to the second stage. *Id.* ¶ 16. At the second stage, the court may appoint counsel for the petitioner, and the State may file a responsive pleading. *Id.* ¶ 17. If the defendant does not make a substantial showing of a constitutional violation at the second stage, the court dismisses the petition. *Id.* However, if the defendant makes such a showing, the matter proceeds to a third-stage evidentiary hearing. *Id.*

¶ 25 In determining whether a defendant made a substantial showing of a constitutional violation at the second stage, the court must take as true all well-pleaded facts in the petition, unless such allegations are "affirmatively refuted by the record." *People v. Domagala*, 2013 IL 113688, ¶ 35, 987 N.E.2d 767. A court may not make credibility determinations until the third stage. *Id.* We review *de novo* an order dismissing a petition at the second stage. *People v. Sanders*, 2016 IL 118123, ¶ 31, 47 N.E.3d 237.

¶ 26 First, defendant claimed he was denied the right to argue for the disclosure of the confidential source. However, the trial court noted "[t]he record in this case directly contradicts that assertion." Dooley filed a motion for the disclosure of the confidential source on January 17, 2013, and the court denied it on December 4, 2015, after Williams raised the issue. In denying

the motion, the court noted defendant had the opportunity at the *Franks* hearing to argue for the disclosure of the confidential source but did not. Moreover, defendant had the opportunity to raise this issue on direct appeal but did not. Accordingly, defendant forfeited the issue. See *People v. Reed*, 2020 IL 124940, ¶ 18, 182 N.E.3d 64 ("[I]ssues that could have been raised on direct appeal, but were not, are forfeited.").

¶ 27 Forfeiture aside, defendant was not constitutionally entitled to the pretrial disclosure of the confidential source. Therefore, defendant could not make a substantial showing of a constitutional violation in his postconviction petition. The United States Supreme Court has held:

> "[A]lthough the Due Process Clause has been held to require the Government to disclose the identity of an informant at trial, provided the identity is shown to be relevant and helpful to the defense, *Roviaro v. United States*, 353 U.S. 53, 60-61 *** (1957), it has never been held to require the disclosure of an informant's identity at a suppression hearing. *McCray v. Illinois*, 386 U.S. 300 *** (1967). We conclude that the process due at a suppression hearing may be less demanding and elaborate than the protections accorded the defendant at the trial itself." *United States v. Raddatz*, 447 U.S. 667, 679 (1980).

¶ 28 Our supreme court has explained that, pursuant to *Raddatz*, a trial court can "exercise *** a discretionary standard *** when considering whether or not disclosure of an informant's identity is warranted at a pretrial suppression hearing." *People v. Vauzanges*, 158 Ill. 2d 509, 519-20, 634 N.E.2d 1085, 1090 (1994). Our supreme court explained:

> "When a *Franks* hearing has been granted, the trial court may in its discretion require the production of the informant and/or the police files on the informant for an *in camera* examination or inspection, if under all the circumstances the trial court doubts the credibility of the police officer/affiant with respect to the existence of the informant. Based upon the trial court's findings at the *in camera* examination or inspection, the court may then exercise its discretion in deciding whether to order disclosure of the informant's identity to the defendant." *Id.* at 520.

Therefore, pretrial disclosure of the identity of a confidential source is a matter for a trial court's discretion rather than a constitutional obligation.

¶ 29 In sum, the record contradicts the assertion defendant did not have the opportunity to argue for the disclosure of the confidential source prior to trial. Moreover, defendant forfeited this issue by failing to address it on direct appeal. Nevertheless, as defendant was not entitled to the pretrial disclosure of the confidential source, he could not make a substantial showing of a constitutional violation. We agree with appellate counsel that any arguments to the contrary would lack arguable merit.

¶ 30 Second, defendant claimed his counsels were ineffective for failing to challenge the warrant for lack of probable cause. Specifically, defendant claimed Schierer was ineffective for failing to introduce all the evidence defendant provided purportedly showing Lay lied in the warrant affidavit. However, the Third District had already disposed of defendant's ineffective assistance of counsel arguments, finding "[t]rial counsel cannot be ineffective for failing to take action when the record demonstrates all four attorneys took affirmative action on the matter." *Schaefer*, 2019 IL App (3d) 170015-U, ¶ 28. The issue of Schierer's ineffectiveness is barred by

res judicata. See *Reed*, 2020 IL 124940, ¶ 18 ("[I]ssues that were raised and decided on direct appeal are barred by *res judicata*."). Therefore, we agree with appellate counsel that any argument raised on this issue would be without arguable merit.

¶ 31 III. CONCLUSION

¶ 32 For the reasons stated, we grant appellate counsel's motion to withdraw and affirm the trial court's judgment.

¶ 33 Affirmed.