2012 IL App (1st) 110805-U

FIFTH DIVISION
November 16, 2012

No. 1-11-0805

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 02 CR 26896
	)	
JANENE CLAY,	)	Honorable
	)	Evelyn B. Clay,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice McBride and Justice Taylor concurred in the judgment.

O R D E R

¶ 1 *Held*: The circuit court properly dismissed defendant's postconviction petition because it failed to establish a substantial showing of a constitutional violation.

¶ 2 Defendant Janene Clay appeals from the dismissal of her petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2006)). On appeal, defendant contends that the petition made a substantial showing that she was denied effective assistance of trial counsel based upon counsel's failure to file a motion to suppress her

involuntary and inculpatory statement. In the alternative, defendant contends that this cause must be remanded for additional second stage proceedings because the circuit court failed to "issue" findings on a core argument. We affirm.

¶ 3 After a bench trial, defendant was convicted of first degree murder and sentenced to 22 years in prison. The evidence at trial established that the victim, defendant's infant grandson, died while in her care during the night of September 19, 2002. Defendant's companion Elwerth Robertson testified that defendant smelled of alcohol that afternoon, and at one point he told defendant not to touch the victim's brother because she had been drinking. Paramedic Jodi King, who responded to defendant's 911 call on the morning of September 20, testified that defendant appeared intoxicated, defendant's speech was slurred, and defendant manifested signs consistent with heroin use. The State also presented the testimony of a deputy medical examiner who testified that the victim's primary cause of death was drowning and the secondary cause was chest compression. The parties then stipulated to the admission of defendant's oral statement made on September 22, 2002. This statement was read into the record.

¶ 4 In the statement, defendant stated that she had used heroin and drunk alcohol on September 19. After an argument with Robertson, she broke a fishtank by throwing cans around the apartment and broke a toilet by dropping a skillet. After the victim and his brother fell asleep, she consumed more alcohol. When defendant woke up around 4 a.m., she felt the victim. He was wet all over, including his hair and clothing. Defendant intended to change him, but forgot. At some point, she went to the bathroom and flushed the toilet, causing water to go everywhere. She called her friend, with whom Robertson was staying, and indicated that he should come fix the toilet. Defendant then went back to sleep. When she woke up around 7:45 a.m., she was surprised that the victim was still asleep. She tapped the victim on the foot after making him a bottle. It was then she discovered that he was not breathing. Defendant called 911

from a neighbor's apartment. She did not call 911 from her phone because the buttons were stuck. Defendant performed CPR on the victim until the paramedics arrived. She did not know how she and the victim got wet. She also stated that she knew that she hurt the victim, but did not know how. She later stated that the victim woke her up crying and she tried to get him back to sleep. Defendant further stated that she woke up before 7 a.m. because people were yelling. At that time, the victim was still sleeping.

¶ 5 Although the defense presented the testimony of the Iowa chief medical examiner, who testified that Sudden Infant Death Syndrome and "overlaying" could not be ruled out as causes of the victim's death, defendant was ultimately found guilty of first degree murder and sentenced to 22 years in prison.

¶ 6 In affirming that judgment on appeal, this court rejected, *inter alia*, defendant's claim that she was not proven guilty beyond a reasonable doubt. *People v. Clay*, 363 Ill. App. 3d 780 (2006). Specifically, this court determined that it was undisputed that defendant had been drinking throughout the day and into the evening of September 19, that she had argued with her boyfriend, and that she was alone with the two children at the time of the victim's death. *Clay*, 363 Ill. App. 3d at 789. The court also noted that defendant admitted that she had used heroin and broken the toilet and fishtank. *Clay*, 363 Ill. App. 3d at 789. Ultimately, this court found it reasonable for the trial court to have concluded, based upon the circumstances and defendant's behavior, that this was not the case of a responsible caretaker who put a child to bed and returned some time later to find him unresponsive or who accidently rolled over onto a child causing him to suffocate. *Clay*, 363 Ill. App. 3d at 789.

¶ 7 In July 2007, defendant filed a *pro se* petition for postconviction relief. The petition alleged that defendant's constitutional rights were violated when, *inter alia*, she was threatened with a lethal injection if she did not give a statement, detained for 76 hours, and refused an

attorney. The petition also alleged that when defendant asked counsel to file a motion to suppress her coerced statement counsel indicated that the statement would be mentioned in mitigation. However, counsel failed to mention the statement in mitigation.

¶ 8 The circuit court docketed the petition and postconviction counsel was appointed. In 2010, postconviction counsel filed a supplemental petition for postconviction relief alleging that defendant was denied effective assistance of counsel by counsel's failure to (1) show that defendant's intoxication negated the requisite mental state for murder, (2) investigate alibi witness Regina Walker, and (3) move to suppress defendant's oral statement. The supplemental petition also raised a claim of actual innocence based upon intoxication. Although the supplemental petition admitted that defendant's statement was not inculpatory and did not contain an admission that defendant drowned the victim, the supplemental petition alleged that the statement "could have prejudiced" the defense at trial because it was incomplete and inaccurate. The supplemental petition further alleged that defendant could have been unclear or misunderstood by the police, thus rendering the statement unreliable.

¶ 9 Attached to the supplemental petition was defendant's affidavit, in which she averred that she did not use heroin on September 19, 2002, and that she had blackouts that night. The affidavit also itemized the alcohol defendant consumed that day. Also attached to the petition was the affidavit of Regina Walker, who averred that defendant spent the night of September 19, 2002, on Walker's couch.

¶ 10 The State then filed a motion to dismiss, which the circuit court ultimately granted. It is from this judgment that defendant appeals.

¶ 11 The Act provides a mechanism through which a criminal defendant may assert a substantial denial of her constitutional rights in the proceedings which resulted in her conviction. 725 ILCS 5/122-1 (West 2006); *People v. Delton*, 227 Ill. 2d 247, 253 (2008). At the second

stage, it is the defendant's burden to make a substantial showing of a constitutional violation; all well-pled facts in the petition that are not positively rebutted by the trial record are taken to be true. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006); see also *People v. Rissley*, 206 Ill. 2d 403, 412 (2003) (while all well-pled facts in the petition and affidavits in support are taken as true, "nonfactual and nonspecific assertions which merely amount to conclusions are not sufficient"). This court reviews the dismissal of a postconviction petition without an evidentiary hearing *de novo*. *Pendleton*, 223 Ill. 2d at 473.

¶ 12 On appeal, defendant contends that she was denied effective assistance of counsel when, rather than filing a motion to suppress, counsel instead stipulated to the admission of defendant's "unconfirmed" and involuntary statement. Defendant argues that her statement was made only after she was threatened with a lethal injection and denied the bathroom. She further argues that she was either intoxicated or suffering from withdrawal at this time and that her "fragile physical and mental state" was exacerbated because she was not provided with her prescribed painkillers, allergy medication, and psychotropic drugs.

¶ 13 In order to prevail on claim of ineffective assistance of counsel, a defendant must establish both that her attorney's actions constituted errors so serious as to fall below an objective standard of reasonableness and that absent these errors, there was a reasonable probability that defendant's trial would have had a different outcome. *Strickland v. Washington,* 466 U.S. 668, 687-88 (1984). Pursuant to the first prong of the *Strickland* test, a defendant must demonstrate that her counsel's performance fell below an objective standard of reasonableness "under prevailing professional norms." *People v. Colon,* 225 Ill. 2d 125, 135 (2007). Under the second prong, the defendant must show that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Colon,* 225 Ill. 2d at 135. Failure to satisfy either part of the *Strickland* test defeats a claim of ineffective

assistance. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). In those cases where an ineffective assistance of counsel claim can be disposed of on the basis that the defendant suffered no prejudice, the court need not determine whether counsel's performance was deficient. *People v. Graham,* 206 Ill. 2d 465, 476 (2003).

¶ 14 The decision whether to file a motion to suppress evidence is traditionally viewed as one of trial strategy, and counsel benefits from a strong presumption that the failure to challenge the validity of the accused's arrest or to seek the exclusion of certain evidence was proper. *People v. Little*, 322 Ill. App. 3d 607, 611 (2001). In order to establish prejudice resulting from counsel's failure to file a motion to suppress, a defendant must show a reasonable probability that the motion would have been granted and the outcome of the trial would have been different had the evidence been suppressed. *People v. Patterson*, 217 Ill. 2d 407, 438 (2005). The failure to file a motion to suppress does not establish incompetent representation when the motion would have been futile. *Patterson*, 217 Ill. 2d at 438.

¶ 15 Here, defendant's claim must fail as she cannot establish prejudice. See *Graham*, 206 Ill. 2d at 476. Although defendant stated in her statement that she had drunk alcohol and used drugs on the day before the victim's death, she never admitted that she drowned the victim, only that she knew she hurt the victim but did not know how. In the instant case, the evidence at trial established that defendant had been drinking the day before the victim's death, that she had argued with her companion who, at one point, told her not to touch the victim's brother because she had been drinking, and that the victim was alone with defendant and his brother in the apartment on the night of his death. Thus, even in the absence of defendant's statement, it was undisputed that she had been drinking and was the only adult with the victim at the time of his death. See *Clay*, 363 Ill. App. 3d at 789. Defendant has failed to show a reasonable probability that the outcome of the trial would have been different in the absence of her statement (see

Patterson, 217 Ill. 2d at 438). Therefore, as defendant cannot show prejudice, her claim of ineffective assistance of counsel must fail. See *Edwards*, 195 Ill. 2d at 163 (failure to establish either prong of the *Strickland* test defeats a claim of ineffective assistance of counsel).

¶ 16 Based upon this court's determination that defendant failed to establish that she was denied effective assistance of counsel by counsel's failure to file a motion to suppress defendant's statement, defendant has failed to make a substantial showing of a constitutional violation, and the circuit court properly denied her postconviction relief. *Pendleton*, 223 Ill. 2d at 473.

¶ 17 In the alternative, defendant contends that this cause must be remanded for additional proceedings because the circuit court did not make explicit findings regarding whether or not she was denied effective assistance of counsel by trial counsel's stipulation to her statement when granting the State's motion to dismiss. We disagree. Although defendant is correct that the circuit court did not make explicit findings regarding this claim in its written order, in announcing its ruling the court stated that it agreed "in total" with the State's position and granted the motion to dismiss. In any event, this court's *de novo* review of defendant's claim, as discussed above, revealed that defendant's petition was properly dismissed because it failed to make a substantial showing of a constitutional violation. See *People v. Childress*, 191 Ill. 2d 168, 174 (2000) (under *de novo* review, there is little justification to give deference to the circuit court's findings at the second stage of proceedings under the Act).

¶ 18 For these reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 19 Affirmed.