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2012 IL App (3d) 100757-U

Order filed May 8, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,) Appeal from the Circuit Court
) of the 21st Judicial Circuit,
Plaintiff-Appellee,) Kankakee County, Illinois,
)
v.) Appeal No. 3-10-0757
) Circuit No. 06-CF-67
DONTA JACKSON,)
) Honorable
Defendant-Appellant.) Clark E. Erickson,
) Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Lytton and McDade concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant alleged sufficient facts in his postconviction petition to survive a summary first-stage dismissal based on claims of ineffective assistance of appellate counsel. We reverse and remand.
- ¶ 2 Defendant, Donta Jackson, was convicted of attempted first degree murder, aggravated battery with a firearm, aggravated discharge of a firearm, aggravated unlawful use of a weapon, and unlawful possession of a weapon by a felon. On direct appeal, this court remanded the case for sentencing after finding defendant's extended term sentence on the aggravated unlawful use

of a weapon charge was impermissible. *People v. Jackson*, No. 3-07-0584 (2009) (unpublished order under Supreme Court Rule 23). Defendant subsequently filed a postconviction petition, which was summarily dismissed. Now, on appeal, defendant argues the trial court erred by dismissing his postconviction petition because he stated the gist of a constitutional claim for ineffective assistance of appellate and posttrial counsel. We agree that defendant's postconviction petition is sufficient to survive summary dismissal, and we reverse and remand the matter.

¶ 3

FACTS

¶ 4 On January 28, 2006, the victim, Leonard Green, was shot in the foot in Kankakee, Illinois. According to witnesses, he was shot sometime between 9:00 and 10:00 p.m. On February 17, 2006, the grand jury returned a bill of indictment charging defendant with attempted first degree murder (720 ILCS 5/8-4(a), 9-1 (West 2006)), aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2006)), aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2006)), aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2006)), and unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2006)). Defendant retained attorney Brian Hiatt to assist him in the defense of this case.

¶ 5 Tomaceia Ward provided a statement to the police on February 1, 2006. In that statement, she asserted she was an acquaintance of both Green and defendant, but she was not a girlfriend to either man. She reported Green first called her on the night of the shooting at 10:47 and told her to relay a message to defendant that if defendant did not give Green \$10,000, defendant would "be going to jail for a very long time." Shortly thereafter, Green called a second time to demand the sum of \$15,000. Ward stated she had known Green for approximately three

years. However, in his testimony, Green denied knowing Ward at all.

¶ 6 On August 1, 2006, Hiatt issued a subpoena for Ward to appear as a defense witness. This subpoena was returned, unserved, on August 16, 2006, with the handwritten notation "supposedly moved." On September 12, 2006, Hiatt again requested the clerk to issue another subpoena for Ward. The second subpoena was returned, unserved, on September 18, 2006, with a notation of "moved." The case was called for a jury trial on September 20, 2006. Hiatt requested a continuance until September 25, 2006, because he had just learned Ward had not been served. The court granted the request for a continuance.

¶ 7 On September 25, Ward still had not been served with the subpoena. Nonetheless, defendant announced he wanted to move forward with the trial and a jury was selected. During his opening statement to the jury on September 26, counsel Hiatt stated:

"Ladies and gentlemen the evidence will show in this case that Mr. Green was so scared, so intimidated, so frightened of [defendant], that minutes after the shooting he caused a communication to [defendant] in which he demanded money from him, several thousand dollars in fact and he said or caused to be communicated to [defendant] that if this money wasn't paid, that [defendant] would go to jail for a very long time."

¶ 8 Green was the State's first witness. Green testified defendant gave him four ounces of cocaine to sell during the summer of 2004 for \$2,500. Green took the cocaine but did not pay defendant for this cocaine. According to Green, on January 28, 2006, Green and his only passenger, Marquese Sherman, were in the drive-thru lane at McDonald's when he saw defendant and Deandre Hampton at the nearby Marathon gas station. After leaving the McDonald's, a vehicle approached Green's car from behind and flashed its lights. When Green pulled over, he

recognized defendant as the front seat passenger. Defendant asked, "[d]o you think I'm playing about the money you owe me?" Green watched defendant reach down by the window, and he ducked down because he "knew what [defendant] was going for." Green heard four or five gunshots, felt a burning sensation in his foot, started his car, and drove off.

¶ 9 During his testimony, Green admitted he first identified Hampton as the shooter in the initial statement he provided to the police. He also admitted he refused to identify defendant in a photo lineup. Green indicated he returned to the police station a couple of days later to give another statement, where he identified defendant, rather than Hampton, as the shooter. He explained he had initially lied to the police because he was afraid of defendant. Green denied knowing Ward.

¶ 10 Marquese Sherman also testified for the State. His testimony indicated the shooting occurred sometime between 9:00 and 10:00 p.m. on January 28, 2006. His testimony largely corroborated Green's, and he identified defendant as the shooter.

¶ 11 On the third day of trial, during the morning of September 27, 2006, Hiatt explained to the court that Ward "was persuaded to come to the courthouse on Monday [the 25th] and I was able, upon seeing her, to get a sheriff's deputy to serve her." Hiatt continued by stating that:

"At that time she flew into a rage, issued a number of profane statements towards me and towards anyone who would listen and stormed out of the Court or stormed downstairs. It was my hope to persuade her that she to—just to come here like today to testify, but she has been utterly uncooperative [a]nd I wanted her, obviously, to appear before the Court so that her subpoena could be continued until Wednesday. In fact, she didn't even appear. She tripped—she, upon being handed the subpoena, she left and under

the circumstances I don't see any other choice, but to request a body attachment for her."

The court issued a body attachment, but stated:

"it could factor into the likelihood that there will be much more recess in order to obtain her presence because we've lost from the 25th to now where the sheriff could have been looking for her, I guess. So I'm allowing your motion for a body attachment, but I—I am noting that the request was not made until September the 27th at—at 1:45."

¶ 12 The trial resumed, and Lakeitha Hill testified for defendant. She stated defendant was the father of her child, and that he was with her at the time of the shooting.

¶ 13 Jammie Allen also testified for defendant. In contrast to Green, he identified two additional passengers in the vehicle on the night of January 28, 2006: himself and Jerry Sherman, brother of Marquese Sherman. At the Marathon gas station, Green and the Shermans argued with some people who Allen did not recognize. Allen stated that this group did not include defendant. Allen said he saw the same group later, this time in a vehicle, when they approached Green's car and began shooting before Green drove away. Allen testified that defendant was not part of the group who shot at them.

¶ 14 Defendant also testified. He stated that on the evening in question, he was with Hampton at the Marathon gas station in Kankakee. While he was there, he saw a car with a couple of individuals he identified as Michael Ledbetter, a/k/a "Mook," Donnell Eggeston, and a woman named Courtney. He also saw another vehicle which contained Green, Marquese Sherman, Jerry Sherman, and Allen. After stopping at Plaza Liquors, defendant and Hampton traveled to Mook's residence where Mook admitted to opening fire on Green. After defendant left Mook's residence, he went to Hill's, arriving sometime between 9:30 and 10:00 p.m.

¶ 15 Defendant further testified that on January 30, 2006, he went to the police station to tell the police about telephone calls he received from Ward. Defendant played these telephone messages for the police, and he gave the police a written statement. Defendant did not testify as to the content of the messages.

¶ 16 After defendant testified, the defense rested without Ward appearing to testify. During closing arguments, Hiatt apologized to the jury for not producing Ward.

¶ 17 Defendant was convicted of all charges. After trial, defendant retained attorney James T. Burns to assist him in his posttrial matters. Attorney Burns filed a motion for a new trial where he alleged, among other things, trial counsel Hiatt was ineffective for not securing Ward as a witness.

¶ 18 During the hearing on defendant's motion for new trial held on January 25, 2007, Hiatt testified that even though Ward had not been served with a subpoena before the first day of trial, defendant wished to begin the trial process. Hiatt explained that Ward came to court on September 25, 2006, received her subpoena, and became "visibly angry." Hiatt did not immediately request a body attachment for Ward because he believed defendant's mother could speak to Ward to gain her cooperation. Hiatt testified this was a technique he had successfully used before to secure the testimony of other witnesses who did not want to come to court and testify. In his experience, a hostile witness can become a bad witness, and Hiatt was trying to avoid a situation where Ward would be brought to court in handcuffs. During cross-examination, Hiatt admitted he had issues with both alcohol and gambling and had been suspended from the practice of law for 60 days with a two-year probation period due to neglecting other cases.

¶ 19 After arguments on the motion for new trial, the court became curious about the status of

the body attachment for Ward because Ward did not appear in court during the jury trial. The court learned the body attachment was never issued because it did not include sufficient identifying information to attempt service.

¶ 20 The trial court denied the motion for a new trial and expressed uncertainty regarding the content of Ward's potential testimony. Thereafter, the State filed a motion to supplement the record with Ward's statement to the police. After reviewing Ward's statement, the trial court reconsidered and denied defendant's motion for a new trial.

¶ 21 Following the judge's ruling, defendant verbally accused attorney Burns of ineffective assistance of counsel because he failed to secure Ward as a witness for the hearing that day. In response to defendant's allegations, Burns admitted defendant had told him that Green had received numerous traffic tickets while driving Ward's car, but he had strategically decided to not to raise that issue because he thought it would undermine Ward's credibility. The trial court found counsel to be effective, and proceeded to the sentencing hearing.

¶ 22 On direct appeal, defendant argued his right to a speedy trial was violated and his extended-term sentence on the aggravated unlawful use of a weapon charge was impermissible. This court agreed that an extended-term sentence was improper and remanded the case for resentencing on that charge. *People v. Jackson*, No. 3-07-0584 (2009) (unpublished order under Supreme Court Rule 23). On remand, defendant was sentenced to 7-years' imprisonment, which was to run concurrent with his 32-year sentence.

¶ 23 On May 29, 2010, defendant filed a postconviction petition alleging ineffective assistance of posttrial and appellate counsel. The trial court summarily denied the petition in a written order. Defendant appealed.

¶ 24

ANALYSIS

¶ 25 On appeal, defendant argues the trial court erred by dismissing his postconviction petition at the first stage. Specifically, defendant alleges: (1) posttrial counsel Burns was ineffective for not calling Hampton to testify at the hearing for a new trial; (2) appellate counsel was ineffective for failing to argue that trial counsel, Hiatt, was ineffective for not securing Ward as a defense witness to establish Green's motive for falsely implicating defendant after identifying Hampton as the gunman; and (3) appellate counsel was ineffective for failing to argue that trial counsel Hiatt, was ineffective during plea negotiations. We elect to consider defendant's second argument first.

¶ 26 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2010)) provides a mechanism for a criminal defendant to claim that a substantial violation of his federal or state constitutional rights resulted in his conviction. To survive a first stage dismissal, the allegations in a postconviction petition, when liberally construed and taken as true, must present only the "gist of a constitutional claim." *People v. Edwards*, 197 Ill. 2d 239, 244 (2001).

¶ 27 In this case, defendant's postconviction petition claims appellate counsel was ineffective. Claims of ineffective assistance of appellate counsel are measured against the same standard as those dealing with ineffective assistance of trial counsel. *People v. Childress*, 191 Ill. 2d 168 (2000). In order for defendant to prevail on an ineffective assistance of counsel claim, defendant must establish the representation he received fell below an objective standard of reasonableness and that, but for these errors, a reasonable probability exists that the results of the proceeding, in this case the appellate proceeding, would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). Thus, defendant's postconviction petition must show the failure to raise an

issue on direct appeal was objectively unreasonable and the decision of appellate counsel prejudiced defendant. *Id.* Unless the underlying issue is meritorious, defendant suffered no prejudice from appellate counsel's failure to raise the issue on direct appeal. *Id.*

¶ 28 In the instant case, we conclude defendant's appellate counsel should have raised an issue based on the ineffectiveness of trial counsel Hiatt, for Hiatt's failure to secure Ward as a defense witness. Appellate counsel's failure to raise the ineffective assistance of trial counsel presents the gist of a constitutional claim when liberally construed in favor of defendant for purposes of a first stage review.

¶ 29 The record on appeal shows that Ward provided a statement to police which would have provided a motive for the victim, Green, to falsely implicate defendant as his assailant. Ward's statement to the police indicated that Green called Ward twice on the night Green was shot, shortly after the time of the shooting. During these conversations, Green asked Ward to relay a message to defendant. According to Ward, Green demanded defendant pay him \$10,000 and then called a second time to demand payment of \$15,000 for defendant to avoid going to jail for a very long time.

¶ 30 Thus, Ward's testimony could have provided the jury with evidence that Green had an ulterior motive for falsely accusing defendant of this shooting. In addition, considering that Green's credibility was questionable given his earlier identification of Hampton as the shooter, Ward's testimony, if believed, could have further impeached his credibility. This is especially true because Green denied knowing Ward. As the above facts demonstrate, Ward was a crucial witness for the defense.

¶ 31 In this case, Hiatt's attempts to secure Ward were arguably unreasonable. Hiatt suspected

that Ward was evading service which would have compelled her to appear as a defense witness before trial. She was finally served with a subpoena to testify while at the courthouse on the first day of trial. After being served, Ward abruptly left the courthouse in defiance of the subpoena. Thereafter, Hiatt waited two days before requesting a body attachment to secure Ward's appearance. However, the body attachment was not sufficiently detailed to allow the sheriff to serve the body attachment on Ward before the trial ended.

¶ 32 Here, Hiatt knew at the time of opening statements Ward was evading service, but he told the jury there would be evidence demonstrating that Green, the victim, attempted to extort money from this defendant even though it was uncertain whether Ward would appear to testify concerning the extortion attempt. Surely, appellate counsel should have recognized it was not a reasonable trial strategy to promise evidence of extortion before securing the appearance of the only witness who could provide the jury with information regarding that extortion attempt.

¶ 33 We further find that there was a reasonable probability that if Ward testified, the results of the proceeding would have been different. Ward herself was a critical witness for the defense. Moreover, defendant was prejudiced when defense counsel promised evidence of extortion, and then failed to deliver. The case law provides:

"Promising a particular type of testimony creates an expectation in the minds of jurors, and when defense counsel without explanation fails to keep that promise, the jury may well infer that the testimony would have been adverse to his client and may also question the attorney's credibility." *People v. Briones*, 352 Ill. App. 3d 913, 918 (2004) (quoting *United States ex rel. Hampton v. Leibach*, 347 F.3d 219, 259 (7th Cir. 2003)).

Thus, we conclude that Ward's importance as a witness, combined with Hiatt's promise, but

ultimate failure, to offer evidence of extortion, establishes a reasonable probability sufficient to survive first stage dismissal that the outcome of defendant's appeal would have been different if appellate counsel had raised the issue.

¶ 34 Accordingly, we conclude defendant has established the gist of a constitutional claim for appellate counsel's failure to raise an issue based on the ineffective assistance of trial counsel. However, we do not intend to indicate the ultimate outcome of further stages of review of this postconviction petition. Since partial dismissals of postconviction petitions are not allowed at the first stage of proceedings, we need not consider the remainder of defendant's arguments, and we remand the entire post-conviction petition for second-stage proceedings. *People v. Rivera*, 198 Ill. 2d 364 (2001).

¶ 35 CONCLUSION

¶ 36 For the foregoing reasons, the judgment of the circuit court of Kankakee County is reversed, and the cause is remanded for further proceedings.

¶ 37 Reversed and remanded.