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2012 IL App (3d) 100837-U

Order filed June 7, 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 12th Judicial Circuit,
Plaintiff-Appellee,)	Will County, Illinois,
)	
v.)	Appeal No. 3-10-0837
)	Circuit No. 99-CF-1462
)	
JUAN C. REYES,)	Honorable
)	Edward A. Burmila, Jr. and
Defendant-Appellant.)	Stephen D. White
)	Judges, Presiding.

PRESIDING JUSTICE SCHMIDT delivered the judgment of the court.
Justices Lytton and Wright concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court did not err in dismissing a portion of defendant's amended postconviction petition without an evidentiary hearing, where defendant's claim of ineffective assistance of trial counsel failed to make a substantial showing of a constitutional violation. Defendant's concurrent sentences were void because consecutive sentences were mandatory.
- ¶ 2 Following a jury trial, defendant, Juan C. Reyes, was convicted of two counts of armed robbery (720 ILCS 5/18-2(a) (West 1998)) and sentenced to two concurrent terms of 29 years'

imprisonment. Defendant appeals the second-stage dismissal of one issue in his amended postconviction petition. Additionally, defendant argues that his concurrent sentences were void. We affirm in part, vacate in part, and remand for a new sentencing hearing.

¶ 3

FACTS

¶ 4 On November 17, 1999, defendant and Francisco Gutierrez were charged by indictment with two counts of first degree murder (720 ILCS 5/9-1(a)(3) (West 1998)) and two counts of armed robbery (720 ILCS 5/18-2(a) (West 1998)). The indictment alleged that on October 23, 1999, defendant and Gutierrez, while armed with a dangerous weapon, took property from Hector Torres and Maria Lopez, and subsequently shot and killed Lopez.

¶ 5 At defendant's jury trial, Torres testified that on October 23, 1999, he was sitting in a parked car with his girlfriend, Lopez, when he heard a tapping sound at the driver's side window. Torres saw two people, both holding weapons. The thinner of the two men, whom Torres later identified as Gutierrez, was holding a pistol and told Torres to get out of the car. The larger of the two men held a gun to Torres' head and demanded his money. While this was happening, Torres saw Gutierrez point a gun at Lopez and take her jewelry. After Torres gave his money to the larger man, the man fled.

¶ 6 Gutierrez then demanded money from Torres, who told him that the larger man had already taken it. Gutierrez took Torres' wallet and wristwatch, and ordered him into the front seat of the car. Gutierrez then demanded money from Lopez, who was sitting in the backseat of the car. Gutierrez took Lopez's jewelry, but Lopez pushed him, and Torres saw the flash of a gunshot. After the gunshot, Gutierrez fled.

¶ 7 Torres attended to Lopez, but determined she was dead. Following the incident, Torres

viewed a lineup in which defendant participated, but was unable to identify defendant as one of the suspects.

¶ 8 Jackie Bravo, Gutierrez's girlfriend, testified that on the night of the incident, Gutierrez told her that he had shot someone. Following Gutierrez's arrest, defendant told Bravo not to tell anyone that he was with Gutierrez on the night in question because "he didn't do it."

¶ 9 Officer Jeff Allbert testified about multiple statements defendant gave to the police following the incident. Defendant initially denied being with Gutierrez, but eventually admitted he approached Torres' car with Gutierrez. Defendant stated that after he ran away, he heard a gunshot. Defendant consistently stated that he did not have a gun and never tried to take any money from anyone.

¶ 10 Gutierrez testified that on the night in question, he was at a party with defendant and wanted to get some money from his aunt's house. Gutierrez then saw a parked car and ran towards it. Gutierrez pulled out his pistol, knocked on the window of the car, and demanded that Torres get out of the car. At that point, defendant fled. Gutierrez admitted to the armed robbery and that his pistol discharged when he was taking jewelry from Lopez. Gutierrez testified that defendant had no involvement in the robbery or the shooting. Gutierrez admitted that he had lied to the police after the incident because he was trying to exculpate himself.

¶ 11 Following deliberations, the jury found defendant guilty of both counts of armed robbery. The jury did not reach a verdict on the two murder counts, and the State subsequently obtained a *nolle prosequi* of those charges. Defendant was sentenced to two concurrent terms of 29 years' imprisonment. Defendant's convictions were affirmed by this court on appeal. *People v. Reyes*, No. 3-02-0482 (2006) (unpublished order under Supreme Court Rule 23).

¶ 12 On June 1, 2007, defendant filed a *pro se* postconviction petition. Defendant's petition was later amended by appointed counsel. In his amended postconviction petition, defendant alleged multiple claims of ineffective assistance of counsel. Relevant to this appeal, defendant alleged that trial counsel was ineffective for failing to investigate and present the testimony of an eyewitness, Gabriel Ramirez.

¶ 13 Defendant attached an affidavit from Ramirez, which stated that on a night in October 1999, at about 11 p.m. or 12 a.m., Ramirez looked out the window and saw two people walking towards a bar. One person, who had a shiny object in his hand, ran towards a car parked across the street from the bar. Ramirez saw someone exit the car, and the person with the shiny object checked that person's pockets. While this was taking place, Ramirez saw the second person run away. Ramirez stated that he did not know anyone that was involved and was never contacted about this incident.

¶ 14 Defendant also attached his own affidavit, which stated that he told his trial counsel about Ramirez, who could verify that defendant was not involved in the murder or armed robbery. Defendant provided counsel with both Ramirez's name and address before trial.

¶ 15 After hearing arguments on the State's motion to dismiss defendant's petition, the trial court dismissed the portion of defendant's claim regarding counsel's failure to interview an eyewitness. Defendant filed a motion to reconsider, which was denied by the trial court. Defendant appeals.

¶ 16 ANALYSIS

¶ 17 On appeal, defendant first argues that the trial court erred by dismissing a portion of his amended postconviction petition at the second stage because trial counsel provided ineffective

assistance by failing to investigate and present the testimony of an eyewitness.

¶ 18 The Post-Conviction Hearing Act provides for a three stage review process in noncapital cases. 725 ILCS 5/122-1 *et seq.* (West 2008); *People v. Hodges*, 234 Ill. 2d 1 (2009). At the first stage, the trial court must independently determine whether the petition is "frivolous or is patently without merit," and based on that finding, either summarily dismiss the petition or docket it for further review. 725 ILCS 5/122-2.1(2) (West 2008). If the petition survives the first stage, an attorney is appointed to assist the petitioner, and the petition proceeds to the second stage. 725 ILCS 5/122-4 (West 2008). At that stage, counsel may amend the petition, and the State may move to dismiss it. 725 ILCS 5/122-5 (West 2008). If the petition is not dismissed at the second stage, it will proceed to an evidentiary hearing if the allegations set forth in the petition, as supported by the record or accompanying affidavits, make a substantial showing of a constitutional violation. 725 ILCS 5/122-6 (West 2008); *People v. Rissley*, 206 Ill. 2d 403 (2003). We review a dismissal of a postconviction petition without an evidentiary hearing *de novo*. *People v. Pendleton*, 223 Ill. 2d 458 (2006).

¶ 19 To prevail on a claim of ineffective assistance of counsel, defendant must establish that: (1) counsel's performance was so deficient that it fell below an objective standard of reasonableness; and (2) there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Albanese*, 104 Ill. 2d 504 (1984).

¶ 20 Whether trial counsel was ineffective for failing to investigate is generally determined by the value of the evidence that was not presented and the closeness of the evidence that was presented. *People v. Morris*, 335 Ill. App. 3d 70 (2002). Decisions regarding whether to call a

particular witness is one of trial strategy, which generally cannot be attacked on the basis of ineffective assistance of counsel. *People v. Johnson*, 385 Ill. App. 3d 585 (2008). However, the failure to interview witnesses may indicate incompetence when trial counsel knows of the witnesses and that their testimony may be exonerating. *People v. Bell*, 152 Ill. App. 3d 1007 (1987).

¶ 21 In this case, defendant contends that Ramirez's testimony at trial would have exonerated him. Ramirez averred that while the person with the shiny object was checking the victim's pockets, the other person ran away. Ramirez's vague description of a possible robbery, in which he did not identify the parties involved or the date, did not contradict Torres' testimony that defendant was present at the robbery, but instead supported it. See *People v. Guest*, 166 Ill. 2d 381 (1995) (defense attorney may exercise discretion not to call a witness whose testimony may be harmful to defendant). As such, we cannot say that trial counsel's decision to refrain from investigating or calling Ramirez was objectively unreasonable. See *People v. Williams*, 147 Ill. 2d 173 (1991) (counsel's incompetence is not indicated where defendant can point to no potentially favorable testimony the witness might offer).

¶ 22 Even assuming, *arguendo*, that trial counsel's performance fell below an objective standard of reasonableness, defendant has failed to demonstrate that Ramirez's testimony would have altered the outcome of the trial, because Ramirez's testimony was cumulative to Torres' testimony. See *Albanese*, 104 Ill. 2d 504. Since defendant cannot show that he was prejudiced by trial counsel's alleged error, it was proper for the trial court to dismiss this part of defendant's petition without an evidentiary hearing.

¶ 23 Defendant next argues that his concurrent 29-year sentences were void because

consecutive sentences were mandatory under section 5-8-4(a) of the Unified Code of Corrections (the Code). 730 ILCS 5/5-8-4(a) (West 1998). The State confesses error, and we agree.

¶ 24 Section 5-8-4(a) of the Code provides that consecutive sentences are required where defendant is convicted of multiple offenses, including a Class X or Class 1 felony, arising out of a single course of conduct and victim suffered serious bodily injury during the commission of that felony. 730 ILCS 5/5-8-4(a) (West 1998). Here, defendant was convicted of two counts of armed robbery, a Class X felony, during which Lopez suffered severe bodily injury. 720 ILCS 5/18-2(b) (West 1998). Accordingly, we vacate defendant's concurrent sentences and direct the trial court to conduct a new sentencing hearing to determine the appropriate sentences to be imposed consecutively. See *People v. Arna*, 168 Ill. 2d 107 (1995) (concurrent sentences are void when consecutive sentences are mandatory).

¶ 25 CONCLUSION

¶ 26 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed in part, vacated in part, and remanded with directions.

¶ 27 Affirmed in part and vacated in part; cause remanded with directions.