2013 IL App (1st) 113012-U

SECOND DIVISION
August 20, 2013

No. 1-11-3012

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. 10 CR 19339
	)	
ALEK RAMIREZ,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE HARRIS delivered the judgment of the court.
Justices Connors and Simon concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant was not denied right to effective assistance of counsel when defense counsel did not make a closing argument; DNA analysis fee improperly imposed; defendant was entitled to $5 per day credit for time spent in presentence custody; judgment affirmed and order assessing fines, fees, and costs corrected.

¶ 2 Following a one-day bench trial, defendant Alek Ramirez was convicted of unlawful use of a weapon by a felon and sentenced to two years of probation. On appeal, defendant argues he was denied the right to effective assistance of counsel because his trial counsel did not make a closing argument. Additionally, defendant contends, and the State agrees, that the trial court

improperly imposed a $200 DNA analysis fee and failed to credit him $5 for each day he spent in presentence custody toward the $15 State Police Operations Fee. We affirm the judgment, vacate the DNA analysis fee, and credit defendant $15 for time spent in presentence custody.

¶ 3 During opening statements, the State argued that by the close of the case, the trial court would learn that defendant was a convicted felon and had a machete on October 18, 2010. The State further contended that the trial court would hear from two or three civilians who saw defendant use the machete and an officer who discovered the same machete. Defense counsel argued that the civilian witnesses were biased against defendant, "[could not] be relied on for the truth of their testimony," and there existed "a long running dispute between the neighbors." Defense counsel further contended that an eyewitness would state "exactly what happened," and the officer "never saw***defendant with the machete."

¶ 4 Ricardo Rivera testified that on October 18, 2010, he was living at 4555 South McDowell Avenue in Chicago. Defendant had been his friend for about 13 years and he had lived next door to defendant for "like [14] years." Just before 7 p.m., Rivera was "in [his] house," on the side of his door, sitting on the stairs with Jose Perez, Perez's mother, and "some other [people]." Defendant, who was coming from work, approached with a foot-and-a-half-long machete "in a pocket thing" on his right hip. Rivera initially testified that he and defendant "got into an argument about something," but could not remember the subject of the argument, and then recalled that "[a]ctually [defendant] said that we were talking stuff about him behind his back." Defendant then grabbed Rivera by the shirt, "put a machete on [his] neck[,] and said that he was going to kill [him]." When Perez told defendant to stop, defendant grabbed Perez "from the hair," put the machete on Perez's neck, and said he was going to cut Perez's throat. A fight ensued in the street. Rivera did not know who called the police, but when they arrived, defendant was sitting on the stairs with the machete.

¶ 5 On cross-examination, Rivera testified that Perez, defendant, and a friend named Gordo had been present during the incident, and this group was "inside of the house." When asked, Rivera stated that before he "left outside of the house," he had seen defendant on the balcony of his house. Rivera also stated that defendant had not touched Perez with the machete. Rivera testified that after the initial confrontation with the machete, defendant went to his house, left the machete, and returned to the group, where he grabbed Rivera by the shirt and tried to pull Rivera out of the door. Rivera added that he "[did not] want to come" to court, did not want to get defendant in trouble, did not want defendant to "do nothing to [him] again," and wanted defendant "to come out."

¶ 6 Jose Renell, who had gone by the name of Jose Perez, testified that he was living on McDowell Avenue on October 18, and defendant was his good friend at the time. At about 6:50 p.m., Renell saw defendant while Renell was "in the house." Defendant had an 18-inch machete in his hand, and put it to the left side of Renell's throat, pulled back Renell's hair, and said, "shut the f*** up or I will cut your neck***"

¶ 7 On cross-examination, Renell initially stated that the incident occurred "inside of the hallway," and that Renell, "[his] friend Rica," and two other people, Elliot and Gordo, were present. When Renell came outside, defendant arrived from work, showed the group "the machete in his pants," and went to his house. Defendant then returned to the group, said "[']I heard you talking stuff behind my back,[']" and put the machete on Rivera's neck. When Renell intervened, defendant pointed at Renell, so that the machete was a foot away from him, and said, "[']shut up before I f'in***cut your neck off.[']"

¶ 8 Officer Mull testified that on October 18 at about 7 p.m., he responded to a call about a man with a knife at approximately 4553 South McDowell. When he arrived, he saw several people standing in the street and defendant walking up a staircase. After observing an 18-inch-long machete in a green case right inside an open apartment door at the top of the staircase,

Officer Mull detained defendant and recovered the machete, which Rivera and Renell positively identified the next day. On cross-examination, Officer Mull acknowledged that he did not see defendant with the machete or discard it inside the apartment.

¶ 9 The State admitted into evidence a certified copy of defendant's prior conviction for possession of a controlled substance.

¶ 10 Defendant testified that on October 18 at approximately 7 p.m., he was returning to his house at 4555 South McDowell. At that time, defendant had a job cleaning up abandoned properties, and he acknowledged that he had a machete in his house, which he stated was a tool. While outside his house, defendant met his aunt, who lived with him, and observed four people in front of a house who were waiting and called out to him. One person, Rivera, showed defendant a plant and asked if he knew what it was. After defendant replied that it was a marijuana plant and Rivera stated that it was a heroin plant, defendant began to walk away, but "he [started] making comments." Defendant returned to the group and asked, "[']Why [are] you talking to me like that[?][']" Defendant grabbed one person by the shirt, and Renell's mother came down the stairs and gave someone a baseball bat, which defendant took "from his hand" and threw away. Defendant denied that he pointed a machete at anyone, and added that "all these guys [were] trying to jump me." Defendant further stated that he had "been here only like [10] years," even though Rivera testified that he had known defendant for 15 years. Defendant contended that "they are just lying" and "he said they were living in the house and they [weren't] living there."

¶ 11 Defendant's aunt, Adelma Azino, testified that she and defendant lived at 4555 South McDowell as of October 18. At around 6:45 p.m., after she returned home from work, defendant asked her for a cigarette, and went to the porch to smoke. Azino then heard yelling, and when she went downstairs, she observed three people lunging at defendant in front of the house. Azino maintained that she did not see defendant with a machete or point a machete at anyone.

When the police arrived, an officer found the machete in the living room, on top of a computer. Azino denied that she told a public defender investigator that defendant called the Chicago Police Department to report the incident.

¶ 12 The parties stipulated that if called to testify, a Cook County public defender investigator would testify that when he interviewed Adelma Azino, she stated that defendant called the Chicago Police Department to report the incident.

¶ 13 After the stipulation, the trial judge asked, "Both sides rest?" Defense counsel replied, "Rest. We ask for a finding of not guilty." The trial judge stated:

> "Step up. I heard the evidence. I find the civilian witnesses and the police officer all to be credible and compelling beyond a reasonable doubt."

Defendant was found guilty and sentenced to two years' mental health probation.

¶ 14 On appeal, defendant argues he was denied the right to effective assistance of counsel because defense counsel failed to make a closing argument. Defendant contends that the State's case was rife with inconsistencies, and there was no strategic reason for foregoing the opportunity to highlight the problems in the State's case. Further, because there were conflicting accounts and no physical evidence that defendant handled the machete, the lack of a closing argument undermines confidence in the trial court's verdict.

¶ 15 As an initial matter, the State argues that defendant's claim is speculative, not properly made on direct appeal, and should instead be raised in a post-conviction proceeding. However, because we find we can address this issue without considering matters outside the record, we will consider defendant's claim on direct appeal. *People v. Poole*, 2012 IL App (4th) 101017, ¶ 7.

¶ 16 Claims of ineffective assistance of counsel are subject to a two-prong test. To prevail, a defendant must show that: (1) his counsel's performance was deficient and (2) the deficient

performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under the first prong, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness. *People v. Evans*, 209 Ill. 2d 194, 220 (2004). As to the second prong, a defendant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. McCarter*, 385 Ill. App. 3d 919, 935 (2008) (citing *People v. Albanese*, 104 Ill. 2d 504, 525 (1984)). A reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome. *Evans*, 209 Ill. 2d at 220. Our review of counsel's performance is highly deferential, and we must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *People v. Robinson*, 299 Ill. App. 3d 426, 433 (1998). Further, competency is judged from the totality of counsel's conduct and not on the basis of what appellate counsel would have done. *People v. Jennings*, 142 Ill. App. 3d 1014, 1029 (1986). The failure to satisfy either prong of the *Strickland* test defeats a defendant's claim. *People v. Peeples*, 205 Ill. 2d 480, 513 (2002).

¶ 17 Defendant points to several alleged inconsistencies in the State's case that could have been highlighted in a closing argument: who was present at the time of the incident, the timing of defendant's appearance at the scene, whether defendant carried or wore the machete, whether the machete touched Renell, and what defendant did after the alleged confrontation with the machete. Additionally, defendant contends that defense counsel failed to bolster certain aspects of the defense witnesses' testimony, such as defendant's testimony that he had only been "here" for 10 years, and so could not have known Rivera for as long as Rivera claimed, defendant's testimony that the group was about to attack him, and defendant's and Azino's testimony that defendant was in a fight, but the machete had remained in the house. Defendant additionally argues that defense counsel could have highlighted that no physical evidence was introduced.

¶ 18 In spite of the inconsistencies that defendant points out, we find that defense counsel's decision to forego closing argument was a matter of strategy. Indeed, in most circumstances, waiver of closing argument, particularly in a bench trial, has been recognized as a matter of trial strategy (*People v. Conley*, 118 Ill. App. 3d 122, 127-28 (1983) (citing *People v. Miller*, 90 Ill. App. 3d 422 (1980); *People v. McMullen*, 82 Ill. App. 3d 1042 (1980); and *People v. Talasch*, 20 Ill. App. 3d 794 (1974)) and a dispute over trial tactics or strategy cannot support a claim of ineffective assistance of counsel (*People v. Carter*, 132 Ill. App. 3d 523, 530 (1985)). By the time both sides rested, the theory announced in defense counsel's opening statement was not supported by the evidence that had been adduced. In his opening statement, defense counsel contended that Rivera and Renell were biased against defendant and that the incident occurred in the context of a long-running dispute. However, Rivera explicitly testified that he did not want to come to court, did not want to get defendant in trouble, and wanted defendant "to come out." Renell also testified that he had been a good friend of defendant's. In addition, Rivera, Renell, and defendant all testified to an argument that appeared to be more spontaneous than part of a long-running dispute among neighbors. One defense witness, Azino, was impeached by a stipulation. Further, by waiving closing argument, defense counsel denied the prosecution an opportunity for rebuttal, which could have highlighted the inconsistencies between defendant's and Azino's testimony. See *Carter*, 132 Ill. App. 3d at 530 (noting that by waiving closing argument, the prosecution was denied the opportunity for any rebuttal which may have proved more damaging than any defense).

¶ 19 We are not persuaded by defendant's citation to *People v. Wilson*, 392 Ill. App. 3d 189 (2009). *Wilson* concerned a jury trial where the prosecutor made a closing argument and defense counsel declined to do so. *Wilson*, 392 Ill. App. 3d at 199-200. The circumstances in *Wilson*, which prompted the court to note that "it would be a rare case in which choosing not to make a closing argument in a *jury trial* would be sound trial strategy" (emphasis added) (*Id.* at 200),

stand in contrast to the circumstances of this case, which was a bench trial where neither side made a closing argument. Here, defense counsel's decision to forego a closing argument was a matter of trial strategy and cannot support defendant's claim that he was denied effective assistance of counsel.

¶ 20 Further, we find that defendant was not prejudiced by his counsel's decision because the evidence against defendant was overwhelming. See *People v. Everhart*, 405 Ill. App. 3d 687, 697 (2010). To establish the offense, the State had to prove that defendant knowingly possessed or used a weapon and that defendant had been previously convicted of a felony. 720 ILCS 5/24-1.1(a) (West 2010). Rivera's and Renell's testimony differed on a few points, such as whether defendant went straight to the group or went inside his house first, but their testimony was consistent for the most important issue—that defendant held a machete and used it to threaten them. The evidence was more than sufficient to find that defendant knowingly possessed the machete, and defendant cannot show a reasonable probability that a closing argument that pointed out collateral inconsistencies would have changed the result. Further, defense counsel provided active and aggressive representation by cross-examining witnesses and making timely objections during trial. *People v. Miller*, 90 Ill. App. 3d 422, 426 (1980). Under these circumstances, defendant cannot show how he was prejudiced, and so his claim of ineffective assistance of counsel fails on this ground as well.

¶ 21 Defendant next contends, and the State agrees, that the trial court improperly imposed a $200 DNA analysis fee. Any person convicted of a felony is required to submit a DNA sample and pay a corresponding $200 fee. 730 ILCS 5/5-4-3(j) (West 2010). However, this fee cannot be imposed if the person is already registered in the DNA database. *People v. Marshall*, 242 Ill. 2d 285, 303 (2011). Here, defendant was previously convicted of a felony. As the trial court is presumed to follow the law and apply it properly (*People v. Baugh*, 358 Ill. App. 3d 718, 730 (2005)), we presume that the circuit court imposed the requirement of a DNA sample and fee

following defendant's previous conviction, and vacate the fee imposed in this case accordingly (*People v. Leach*, 2011 IL App (1st) 090339, ¶ 38, 40).

¶ 22 Defendant also contends, and the State agrees, that he was improperly denied a $5 per day credit for time spent in presentence custody. Any person incarcerated on a bailable offense who does not supply bail is entitled to a $5 per day credit for each day incarcerated. 725 ILCS 5/110-14(a) (West 2010). This credit applies only to fines imposed pursuant to a conviction. *People v. Johnson*, 2011 IL 111817, ¶ 8. Here, defendant was ordered to pay a $15 State Police Operations Fee, the proceeds of which can be used for homeland security purposes (705 ILCS 105/27.3a(1.5), (6) (West 2012)) or to finance any of the Department of State Police's lawful purposes or functions (30 ILCS 105/6z-82(b) (West 2012)). A fine is generally characterized as punishment for a conviction, while a fee seeks to recoup expenses incurred by the state for prosecuting the defendant. *People v. Jones*, 223 Ill. 2d 569, 582 (2006). Because it does not reimburse the state for expenses incurred in a defendant's prosecution, the State Police Operations Fee is a fine (*People v. Milsap*, 2012 IL App (4th) 110668, ¶ 31), and therefore subject to the $5 per day credit. Officer Mull testified that he detained defendant on October 18, 2010, and defendant remained in custody until he was sentenced on September 19, 2011. This is more than enough time spent in presentence custody to offset the $15 State Police Operations Fee. Accordingly, we reduce defendant's fines, fees, and costs from $565 to $350 to reflect the vacated $200 DNA fee and the $15 credit toward the State Police Operations Fee.

¶ 23 Affirmed; order assessing fees, fines, and costs corrected.