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2016 IL App (3d) 140287-U

Order filed June 21, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois.
Plaintiff-Appellee,)	
v.)	Appeal No. 3-14-0287
AARON HOLLEY,)	Circuit No. 04-CF-1020
Defendant-Appellant.)	Honorable Stephen A. Kouri, Judge, Presiding.

PRESIDING JUSTICE O'BRIEN delivered the judgment of the court.
Justices Carter and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* The denial of a defendant's claims for postconviction relief after an evidentiary hearing was affirmed because the trial court's conclusion that appellate counsel was not objectively unreasonable for failing to raise the rape shield issue on appeal was not manifest error where the evidence was not offered to provide a plausible alternative source of physical evidence or to rebut a completely unbelievable portrait of the victim. Also, the defendant's claim that the indictment was defective was barred by *res judicata* and postconviction counsel provided a reasonable level of assistance.

¶ 2 The defendant, Aaron Holley, appeals the second-stage dismissal of one claim raised in his petition for postconviction relief and the denial of the remaining claims after an evidentiary hearing.

¶ 3 **FACTS**

¶ 4 The defendant was charged by indictment with aggravated criminal sexual assault in violation of section 12-14(a)(1) of the Criminal Code of 1961 (the Code) (720 ILCS 5/12-14(a)(1) (West 2004)). Specifically, the indictment alleged that he committed an act of sexual penetration while displaying a handgun, an offense actually prohibited by section 12-14(a)(8) of the Code (720 ILCS 5/12-14(a)(8) (West 2004)) rather than section 12-14(a)(1). The defendant was convicted after a jury trial and sentenced to 24 years in prison. The 24-year sentence was based upon a sentence of 14 years, with a 10-year statutory enhancement pursuant to section 12-14(d)(1) of the Code (720 ILCS 5/12-14(d)(1) (West 2004)). The defendant filed a *pro se* motion for a new trial, wherein he alleged ineffective assistance of counsel, among other things.

¶ 5 On direct appeal, the defendant argued that (1) the matter should be remanded for the trial court to determine whether a new attorney should be appointed to argue his ineffective assistance claim; (2) his sentence was void because it was not authorized by statute; (3) the statutory provision under which he should have been sentenced violates the Illinois Constitution's prohibition against disproportionate penalties; and (4) in imposing the sentence, the court relied upon an improper factor in aggravation. *People v. Holley*, 377 Ill. App. 3d 809 (2007). We affirmed the defendant's conviction, but vacated his sentence and remanded the case for resentencing. We found that the defendant was improperly sentenced under section 12-14(a)(1) of the Code, which specifically provided for a dangerous weapon other than a firearm. We also

remanded for a hearing to determine the factual basis of the defendant's ineffective assistance claim concerning a request for a bench trial. *Holley*, 377 Ill. App. 3d at 812.

¶ 6 On remand, counsel was appointed to represent the defendant. Appointed counsel filed a petition for posttrial relief, raising a number of additional issues, including ineffective assistance of appellate counsel. However, the trial court limited the proceedings on remand to the mandate, thereby limiting the issue to whether the defendant was denied effective assistance of counsel on the bench trial issue. After the hearing, the trial court found that there was no ineffective assistance of counsel. As for sentencing, the State argued that the appropriate sentencing range was 6 to 30 years, and it did not seek the additional 15-year penalty authorized by section 12-14(d)(1) due to the procedural issues in the case. The defendant argued that he could not be sentenced to more than 14 years, which was his original base sentence. The trial court found that it was not so limited since the defendant's original sentence was void, and it sentenced the defendant under the appropriate statute to 24 years in prison.

¶ 7 The defendant appealed, arguing that he was denied effective assistance of appellate counsel on the first appeal. However, we found that was beyond the mandate on remand and directed the defendant to look to the Post-Conviction Hearing Act. *People v. Holley*, No. 3-08-0742 (2010) (unpublished order under Supreme Court Rule 23). We affirmed, finding that the trial court did not err in concluding that there was no ineffective assistance of trial counsel on the bench trial issue. We also found that the improper charge under section 12-14(a)(1) of the Code rather than 12-14(a)(8) of the Code was a miscitation and a formal defect rather than a substantive defect and that the defendant was properly notified of the charge against him. We affirmed the 24-year sentence.

fatal defects in the indictment. Second, he argues that the trial court improperly denied his claim that his appellate counsel was ineffective for failing to raise on appeal the violation of the defendant's Sixth Amendment right to cross-examine the victim because of the rape shield law. Lastly, the defendant argues that his postconviction counsel failed to provide him a reasonable level of assistance because he did not raise the claim that appellate counsel was ineffective for failing to challenge the defendant's conviction on direct appeal.

¶ 13

I. Appellate counsel

¶ 14

Claims of ineffective assistance of appellate counsel are evaluated under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984). *People v. Harris*, 206 Ill. 2d 1, 58-9 (2002). A defendant who contends that appellate counsel rendered ineffective assistance must show that the failure to raise the issue was objectively unreasonable and that the decision prejudiced the defendant. *People v. W.*, 187 Ill. 2d 418, 435 (1999). Appellate counsel is not obligated to raise "every conceivable issue on appeal," but rather is expected to "exercise professional judgment to select from the many potential claims of error that might be asserted on appeal." *People v. English*, 2013 IL 112890, ¶ 33 (quoting *People v. Williams*, 209 Ill.2d 227, 243 (2004)).

¶ 15

The Post-Conviction Hearing Act (Act) provides a three-stage review process for a criminal defendant to challenge the validity of his conviction based upon a constitutional violation. 725 ILCS 5/122-1 *et seq.* (West 2012). During the second and third stages of a postconviction proceeding, the defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). At the second stage of proceedings, all well-pleaded facts that are not positively rebutted by the trial record are taken as true, and we review a dismissal at this stage using a *de novo* standard. *Id.* When a petition

advances to a third-stage evidentiary hearing, we will not reverse a trial court's decision unless it was manifestly erroneous. *Id.*

¶ 16 The defendant's claim that his appellate counsel was ineffective for failing to challenge the defects in the indictment was dismissed at the second stage. The defendant points out that appellate counsel on direct appeal argued that the defendant was incorrectly sentenced but did not make the argument that the indictment was fatally flawed, thereby rendering the defendant's conviction invalid. The State argues that this issue was decided adversely to the defendant in his second appeal and is *res judicata*. While the second appeal specifically refused to consider the defendant's allegations of ineffective assistance of appellate counsel, because that was not within the scope of the mandate on remand, the appropriateness of the charging instrument was considered in conjunction with the sentencing. *Holley*, No. 3-08-0742. We found that the defendant was properly notified of the charges against him and the improper citation in the indictment was a formal defect rather than a substantive defect. *Id.* Thus, the claim that appellate counsel was ineffective on that basis would fail and dismissal was appropriate. See *People v. Tate*, 2012 IL 112214, ¶ 8 (issues raised and decided on direct appeal are barred by *res judicata*).

¶ 17 The defendant's claim that his appellate counsel was ineffective for failing to argue that the application of section 115-7 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-7 (West 2004)), commonly referred to as the rape shield statute, violated his Sixth Amendment right to cross-examine the victim was denied after an evidentiary hearing, so we review that decision for manifest error. In all criminal prosecutions, the accused has the right to be confronted with the witnesses against him. U.S. Const., amend VI. Under the Illinois rape shield statute, the prior sexual activity or reputation of a victim of certain alleged sex crimes is

inadmissible except (1) as evidence of past sexual conduct between the alleged victim and the accused offered to show consent; or (2) when constitutionally required to be admitted. 725 ILCS 5/115-7(a) (West 2004). The rape shield statute cannot be used to infringe upon the defendant's constitutional rights. *People v. Sandoval*, 135 Ill. 2d 158, 175 (1990).

¶ 18 At trial, the State moved to bar the defendant from introducing evidence that the 16-year-old victim had a young child on the basis that it would be an indirect mention of the victim's prior sexual experience. The defendant argues that the evidence was admissible to show that the victim had knowledge of sexual activity, which went to the victim's inconsistent testimony regarding whether the defendant and the other perpetrator ejaculated, in conjunction with the fact that there was no physical evidence on the victim or in the vehicle. The victim testified that she was 16 years old, a sophomore in high school, and that she lived with her mother and her brother. In its closing, the State argued that the victim may have confused ejaculation for moisture or powder she had applied. The defendant argues that this made the victim's knowledge of sexual activity an issue so that the rape shield statute did not apply.

¶ 19 In support of his argument, the defendant cites to *People v. Anthony Roy W.*, wherein we found that trial counsel was objectively unreasonable for failing to introduce evidence of the victim's prior sexual experience because it would have provided a plausible alternative source of the State's physical evidence and would therefore be admissible under the constitutional exception provision of the rape shield doctrine. *People v. Anthony Roy W.*, 324 Ill. App. 3d 181, 183 (2001). In that case, the victim was the defendant's 12-year-old daughter and the physical evidence showed sexual conduct, but the expert could not say when it had taken place. The evidence that trial counsel did not present was the testimony of a 14-year-old boy, who claimed to have sexual intercourse with the victim in the summer before she made the allegations against

her father. *Id.* Conversely, in *People v. Sandoval*, evidence of a victim's prior sexual activity was not admissible because the other testimony in that case did not present the jury with a completely unbelievable portrait of the victim that could only be rebutted with the excluded evidence. *People v. Sandoval*, 135 Ill. 2d 159, 177 (1990).

¶ 20 Unlike the situation in *Anthony Roy W.*, the evidence in this case was not being offered as a plausible alternative for the physical evidence. Rather, it was the lack of physical evidence, and the State's argument that the victim was confused, that the victim's experience spoke to. The jury was presented with a teenaged victim, who was unsure whether the perpetrators ejaculated, but who was asked and answered affirmatively that she knew what ejaculation was. Like *Sandoval*, this was not a case where the State presented a completely unbelievable portrait of the complainant which would only be rebutted by the introduction of the proffered testimony. We find that there was no manifest error in the trial court's denial of the defendant's petition on this basis.¹

¶ 21 II. Postconviction counsel

¶ 22 The defendant argues that his postconviction counsel failed to provide him with a reasonable level of assistance in that postconviction counsel did not allege ineffective assistance of appellate counsel for failing to argue that the defendant was not proven guilty beyond a reasonable doubt. The State argues that there was no unreasonable assistance because, viewing the evidence in the light most favorable to the State, the evidence of the defendant's guilt was sufficiently proved beyond a reasonable doubt.

¹ Evidence regarding the defendant's claim of actual innocence was also presented at the third-stage evidentiary hearing, but was limited to testimony that a video from the gas station may have been available at one time. The trial court's denial of the petition after the evidentiary hearing included this claim. The defendant did not make any argument on appeal with respect to this claim, except to acknowledge that no video existed and to suggest that, if it existed, it may have presented the defendant with an alibi.

¶ 23 There is no constitutional right to the assistance of counsel in postconviction proceedings; the right to counsel is wholly statutory and petitioners are only entitled to the level of assistance provided for by the Post-Conviction Hearing Act (Act), which is a reasonable level of assistance. 725 ILCS 5/122-1 et seq. (West 2012); *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). Reasonable assistance requires counsel to make any routine amendments that are necessary for the adequate presentation of the defendant's contentions. *People v. Turner*, 187 Ill. 2d 406, 412 (1999). As stated above, claims of ineffective assistance of appellate counsel are evaluated under *Strickland*: a defendant who contends that appellate counsel rendered ineffective assistance must show that the failure to raise the issue was objectively unreasonable and that the decision prejudiced the defendant. *People v. W.*, 187 Ill. 2d 418, 435 (1999). Whether postconviction counsel provided a reasonable level of assistance is compliance with Supreme Court Rule 651(c) (eff. Feb. 6, 2013) is reviewed *de novo*. *People v. Suarez*, 224 Ill. 2d 37, 41-42 (2007).

¶ 24 As the defendant points out, there was no physical evidence corroborating the victim's testimony. However, her in- and out-of-court identifications of the defendant and her description of the events were consistent. The defendant claimed not to have been in the vehicle, making the issue one of credibility, which is a matter for the jury. *People v. Kirchner*, 2012 IL App (2d) 110255, ¶ 11. As the defendant acknowledges, a reviewing court will not set aside a criminal conviction unless the evidence is so improbable or unsatisfactory that it raises a reasonable doubt regarding the defendant's guilt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). The defendant argues that the lack of physical evidence made the evidence so unsatisfactory that the decision by first appellate counsel not to raise the issue of reasonable doubt was objectively unreasonable and the failure by postconviction counsel to argue that ineffective assistance was not reasonable assistance.

¶ 25 This was a credibility contest between the defendant and the victim. There was no physical evidence to support or challenge either version of events. Appellate counsel would have been mindful of the fact that it was the jury's province to decide credibility, weigh the evidence, draw inferences, and resolve conflicts in the evidence. *Kirchner*, 2012 IL App (2d) 110255, ¶ 11. Considering the evidence in the light most favorable to the prosecution, as is required when reviewing the sufficiency of the evidence, see *Collins*, 106 Ill. 2d at 261, appellate counsel's decision not to raise the issue was objectively reasonable and did not prejudice the defendant.

¶ 26 CONCLUSION

¶ 27 The judgment of the circuit court of Peoria County is affirmed.

¶ 28 Affirmed.