2015 IL App (4th) 140115-U

NO. 4-14-0115

FILED
December 30, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Adams County
DAVID R. BENTZ	)	No. 08CF505
Defendant-Appellant.	)	
	)	Honorable
	)	William O. Mays,
	)	Judge Presiding.

PRESIDING JUSTICE KNECHT delivered the judgment of the court.
Justices Turner and Pope concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant failed to state the gist of a claim he was denied the effective assistance of counsel where appellate and trial counsel failed to argue the police lacked probable cause for his arrest.

(2) Defendant was improperly convicted and sentenced for both felony murder and aggravated arson, the predicate felony for the felony-murder conviction.

¶ 2 In December 2013, defendant, David R. Bentz, filed a *pro* se petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-8 (West 2012)). In his petition, defendant alleged, in part, he was denied the effective assistance of counsel when trial and appellate counsel failed to (1) move to suppress his arrest when no probable cause existed, and (2) argue his convictions and sentences for one count of aggravated arson (720 ILCS 5/20-1.1 (West 2008)) and for three counts of felony murder violate the prohibition against double

jeopardy. The trial court found the petition frivolous and patently without merit and dismissed it.

¶ 3 On appeal, defendant argues the dismissal is erroneous. We agree in part and affirm the dismissal, but vacate one aggravated-arson conviction and sentence.

¶ 4 I. BACKGROUND

¶ 5 In the early morning hours of October 25, 2008, a fire was set in defendant's apartment. Three tenants of the same building died in the fire; a Quincy firefighter was injured. Two days later, defendant was charged with three counts of first-degree felony murder (720 ILCS 5/9-1(a)(3) (West 2008)) and two counts of aggravated arson (720 ILCS 5/20-1.1 (West 2008)). Counts I through III specify felony-murder charges for each individual who died in the fire. Count IV alleges defendant committed aggravated arson in that he committed arson damaging a building in which he should have reasonably known individuals were present. *Id.* Count V alleges defendant committed aggravated arson resulting in an injury to a firefighter in the line of duty. *Id.*

¶ 6 In March 2009, defendant moved to suppress his confession. At the hearing on the motion, testimony established police detectives Gabriel Vanderbol and Anjanette Stovall investigated the fire. These detectives identified defendant as the prime suspect as the "incendiary" fire originated around 3 a.m. in the apartment defendant shared with his wife, Heather Cole-Bentz and their daughter. The detectives located and interviewed Heather. They learned Heather secured an order of protection against Bentz on October 23, 2008, mandating Bentz stay away from Heather and her daughter and vacate the apartment. Defendant had been staying with Teresa Lamberson. The officers met with Lamberson, who said defendant showed up early Saturday morning for a brief time, which woke her. Near 6 p.m. that same day, the

detectives went to Lamberson's residence to question defendant. The detectives told defendant they would like to question him about the fire. Defendant denied knowing anything about the fire but voluntarily went to the Quincy police department with the detectives. Defendant was informed he was not under arrest.

¶ 7 The detectives interviewed defendant upon advising him of his *Miranda* rights. During the interview, defendant denied being in the apartment since being served with the order of protection on October 23. Pursuant to the court order, defendant vacated the apartment and locked the door with his key when he left. Defendant had the key with him at the time of the interview. Heather had lost her key, which was not labeled.

¶ 8 Defendant told Detective Vanderbol he last saw Heather on Monday, October 20, 2008, when she moved from the apartment into her mother's home. Later, defendant admitted seeing Heather on October 22. On that date, Heather gave defendant a ride to the apartment and told defendant she was filing for divorce on October 24. Defendant became angry and "busted" the passenger-side window of her vehicle by striking it several times with his hand. Defendant admitted fighting with Heather for several months and he had been criminally charged for throwing a soda can through a window of the residence of Heather's friend after that friend would not allow defendant to enter the residence to talk to Heather. Defendant was "bummed" about the divorce.

¶ 9 During the interview, Detective Vanderbol told defendant "some fire damage" affected his apartment. When asked about his whereabouts on October 24 and 25, defendant stated he borrowed money from his friend Chris Pendergist and, around 8:30 p.m. on October 24, he walked from Lamberson's house to a bar where he drank between 6 and 10 beers. Defendant

returned to Lamberson's for pool cues around 9:30 p.m. and returned to the bar where he stayed until near closing. Defendant was "rather drunk." He walked to Lamberson's and used her phone to call Pendergist. Defendant then walked to Pendergist's house, where he stayed until around 5 p.m. on October 25, when he returned to Lamberson's.

¶ 10 Detective Vanderbol informed defendant he knew defendant was the only person with a key to the apartment, there was no evidence of a forced entry, and the fire had been set. Defendant stated he locked the door to the apartment when he left after receiving the restraining order on Thursday, October 23, but he violated the order of protection by returning to the apartment between 8 and 9 p.m. to retrieve some computers and other items. Defendant stated he did not lock the door because his hands were full. Defendant took his computers to Pendergist's house. Defendant denied knowing anything about the fire because he had not been to the apartment since Thursday night.

¶ 11 Defendant asked if he was a suspect. Detective Vanderbol said that he was. Defendant initially stated Pendergist was with him when he went to the apartment on Thursday night and saw defendant leave without locking the door. Then, after Detective Vanderbol said he would interview Pendergist, defendant reported Pendergist drove him to the apartment but did not go inside with him. Defendant told Pendergist, when he returned, he left the door unlocked.

¶ 12 At this point in the interview, defendant began asking questions about having an attorney present. Detective Vanderbol left the interview room. Before he did so, the detective told defendant he could not leave. At this point, Detective Vanderbol considered defendant in custody. The interview recommenced. The rest of the interview is not relevant to this appeal.

¶ 13 The trial court denied the motion to suppress the statements and the trial ensued.

The jury found defendant guilty of all charges. The trial court sentenced defendant to three terms of natural life in prison for the murders and to 30 years in prison for each count of aggravated arson. The sentences were to run concurrently.

¶ 14 On direct appeal, defendant asserted two claims. Defendant argued (1) his statements should have been suppressed because he had invoked his right to counsel, and (2) trial counsel was ineffective for failing to invoke the marital privilege to prevent defendant's wife from testifying against him. *People v. Bentz*, 2012 IL App (4th) 100119-U, ¶¶ 2-3. This court affirmed. *Id.* ¶ 4.

¶ 15 In December 2013, defendant filed his petition for postconviction relief. Defendant asserted seven claims, two of which are pursued on appeal: trial and appellate counsel were ineffective for failing to (1) argue his sentences for both aggravated-arson counts constitutes double jeopardy and (2) argue his arrest was illegal as probable cause did not exist until after his arrest.

¶ 16 In January 2013, the trial court dismissed his petition as frivolous and patently without merit. The court found the petition failed to allege any violation of defendant's constitutional rights and the allegations were forfeited or barred by *res judicata* or were matters of trial strategy. This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 The Act sets forth a method by which criminally sentenced individuals may assert their convictions resulted from a substantial denial of their constitutional rights. *People v. Hodges*, 234 Ill. 2d 1, 9, 912 N.E.2d 1204, 1208 (2009). An individual commences proceedings under the Act by filing a petition in the circuit court in which the original proceeding was held.

Id. In postconviction proceedings, a petitioner must "clearly set forth the respects in which the petitioner's constitutional rights were violated." 725 ILCS 5/122-2 (West 2012). At this stage, the first stage, a defendant need only present a limited amount of detail (*People v. Torres*, 228 Ill. 2d 382, 394, 888 N.E.2d 91, 100 (2008)), alleging only sufficient facts to make a claim that is *arguably* constitutional (*Hodges*, 234 Ill. 2d at 9, 912 N.E.2d at 1208). A trial court shall, however, dismiss any petition it determines is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2012). We review *de novo* first-stage dismissals. See *People v. Couch*, 2012 IL App (4th) 100234, ¶ 11, 970 N.E.2d 1270.

¶ 19 We begin with the State's argument defendant's petition was properly dismissed because defendant failed to comply with section 122-2 (725 ILCS 5/122-2 (West 2012)) by not attaching affidavits, documents, or other evidence to support the allegations, or by not providing an explanation for their absence. The State maintains this fact alone supports the dismissal.

¶ 20 The State's argument fails. The record shows defendant complied with section 122-2. In a statement "subscribed and sworn" before a notary public, defendant asserted: "Exhibit[s] are not attached and/or this petition is not detailed [due] to correctional officer's [*sic*] at Menard confiscating all of defendant's legal materials for this petition."

¶ 21 Turning to defendant's contentions, defendant argues the trial court erroneously dismissed his petition as frivolous and patently without merit because he was denied the effective assistance of counsel when trial counsel failed to challenge his arrest and appellate counsel failed to raise the issue on direct appeal. Defendant argues, when he was arrested, the police lacked probable cause. He further questions the magnitude of his alleged inconsistencies in his pre-arrest statements and, citing *People v. Reynolds*, 94 Ill. 2d 160, 445 N.E.2d 766 (1983), contends

those statements were insufficient to create probable cause.

¶ 22 Criminal defendants have the constitutional right to the effective assistance of counsel. *People v. Domagala*, 2013 IL 113688, ¶ 36, 987 N.E.2d 767. To plead sufficiently a claim for ineffective assistance of counsel at the first stage, a postconviction petitioner must show it is arguable (1) counsel's representation fell below an objective standard of reasonableness, and (2) absent the error, there is a reasonable probability the proceeding's outcome would have been different. See *Hodges*, 234 Ill. 2d at 17, 912 N.E.2d at 1212 (setting forth the minimum pleading requirements at the first stage of proceedings under the Act); *People v. Daugherty*, 204 Ill. App. 3d 614, 618, 561 N.E.2d 1384, 1387 (1990).

¶ 23 A warrantless arrest is valid if it is supported by probable cause. *People v. Jackson*, 232 Ill. 2d 246, 274-75, 903 N.E.2d 388, 403 (2009). " 'Probable cause to arrest exists when the facts known to the officer at the time of the arrest are sufficient to lead a reasonably cautious person to believe that the arrestee has committed a crime'." *Id.* at 275, 903 N.E.2d at 403 (quoting *People v. Wear*, 229 Ill. 2d 545, 563-64, 893 N.E.2d 631, 642 (2008)). The standard for the probable-cause determination is the probability of criminal activity, not proof beyond a reasonable doubt. *Wear*, 229 Ill. 2d at 564, 893 N.E.2d at 643. The question depends on commonsense considerations. *Jackson*, 232 Ill. 2d at 275, 903 N.E.2d at 403. "[P]robable cause does not * * * demand a showing that the belief that the suspect has committed a crime be more likely true than false." *Wear*, 229 Ill. 2d at 564, 893 N.E.2d at 643.

¶ 24 The record establishes the following facts and circumstances were known to Detective Vanderbol at the time he considered defendant under arrest. Detective Vanderbol was investigating a fire that was set at 3 a.m. in defendant's apartment. The detectives knew

defendant shared that apartment with Heather and their daughter and Heather secured an order of protection against Bentz two days earlier. Lamberson informed the officers defendant had been to her residence the morning of the fire. Defendant voluntarily went to the police station to be interviewed. While there, defendant initially stated last seeing Heather on October 20, but then admitted seeing her on October 22 and busting her car window upon learning of her intent to file for divorce. Defendant stated he was last at the apartment on October 23, after being served with the order of protection. When Detective Vanderbol informed defendant he was the only one with a key and there was no evidence of forced entry, defendant admitted going to the apartment, in violation of the order of protection, between 8 and 9 p.m. on October 23 to retrieve computers and other items. Defendant stated he did not lock the door because his arms were full. After Detective Vanderbol told defendant he would interview Pendergrist, defendant stated Pendergrist remained in the car and was not in the apartment with him, but defendant told Pendergrist he left the door unlocked.

¶ 25 Given these facts and circumstances, probable cause supports defendant's arrest and a motion to quash arrest would have been denied. Defendant asserts no facts showing he was arguably denied the effective assistance of counsel.

¶ 26 *Reynolds*, defendant's case authority, is distinguishable. In *Reynolds*, unlike here, the question of probable cause was examined under the manifest-error standard after a motion to quash arrest was granted. *Reynolds*, 94 Ill. 2d at 165-66, 445 N.E.2d at 769. The pre-arrest facts did not establish the arresting officer knew a crime had been committed before the arrests. *Id.* at 166, 445 N.E.2d at 769 ("Under the circumstances present here, the detention of defendants until the commission of the crime could be verified cannot be sanctioned."). In addition, the

inconsistent statements originated from different individuals (see *id.* at 163, 445 N.E.2d at 768), not from the same individual during one conversation.

¶ 27 Defendant further argues he was denied the effective assistance of counsel when his counsel at trial and on appeal failed to argue he could be convicted of only one count of aggravated arson. Defendant maintains his two convictions for aggravated arson violate double jeopardy as one serves as the predicate offense for his felony-murder convictions.

¶ 28 Multiple convictions are improper if based on lesser-included offenses. *People v. Bailey*, 364 Ill. App. 3d 404, 410, 846 N.E.2d 147, 152 (2006). When a defendant is found guilty of both felony murder and its underlying predicate offense, the underlying offense is a lesser-included offense. *Id.* A separate conviction and sentence for the lesser offense cannot stand. *Id.* Here, count IV is the lesser-included offense for defendant's felony-murder convictions. The failure of trial and appellate counsel to raise the issue falls below an objective standard of reasonableness.

¶ 29 The State maintains, however, defendant is not entitled to relief because he cannot prove prejudice, the second prerequisite of an ineffective-assistance-of-counsel claim. The State emphasizes defendant was sentenced to three terms of natural life and the relief he seeks, the vacation of one concurrent 30-year prison term, will have no effect on the sentence he serves or any later sentences he may receive.

¶ 30 We disagree with the State's assertion. While the second part of the test is referred to as the prejudice prong (see *e.g.*, *Domagala*, 2013 IL 113688, ¶ 36, 987 N.E.2d 767), the analysis of that part of the test turns not on whether the defendant will suffer real-life consequences as a result of the error. The State cites no case holding so. Instead, the test

requires this court to consider whether the outcome of the sentencing hearing would have been different absent counsel's error (see *Daugherty*, 204 Ill. App. 3d at 618, 561 N.E.2d at 1387) or whether "the deficient performance so prejudiced the defense as to deny the defendant a fair sentencing hearing" (*People v. Stanley*, 246 Ill. App. 3d 393, 403, 615 N.E.2d 1352, 1360 (1993)). Here, the record plainly establishes had counsel at trial or on direct appeal raised this issue the outcome would have been different and defendant was denied a fair sentencing hearing as he was twice sentenced for the same crime.

¶ 31 Defendant's conviction and sentence violates the prohibition against double jeopardy. His sentence must be vacated. See *People v. Brunt*, 332 Ill. App. 3d 974, 979, 775 N.E.2d 11, 16 (2002) (vacating an armed-robbery conviction, the predicate offense for a felony-murder conviction, and affirming the first-stage dismissal of a postconviction petition).

¶ 32 III. CONCLUSION

¶ 33 We affirm the trial court's dismissal of the petition for postconviction relief. We vacate petitioner's conviction and sentence on count VI. As part of our judgment, we grant the State's request defendant be assessed $50 as costs for this appeal.

¶ 34 Affirmed in part and vacated in part.