2016 IL App (4th) 140480-U

NOS. 4-14-0480, 4-14-0481 cons.

FILED
June 23, 2016
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.	)	Sangamon County
ADETOKUNBO P. FAYEMI,	)	Nos. 02CF933
Defendant-Appellant.	)	02CF979
	)	
	)	Honorable
	)	Leslie J. Graves,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Knecht and Justice Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, finding the trial court did not err in dismissing defendant's amended postconviction petition.

¶ 2 In September 2005, a jury found defendant, Adetokunbo P. Fayemi, guilty of one count of attempt (first degree murder) and seven counts of aggravated battery. In June 2006, the trial court sentenced him to 25 years in prison on the attempt conviction and seven consecutive 2-year terms on the aggravated-battery convictions. The latter convictions were to be served consecutively to the attempt conviction. On direct appeal, this court affirmed defendant's convictions, vacated that portion of the sentencing order imposing consecutive sentences on the aggravated-battery convictions, and remanded for a new sentencing order imposing concurrent sentences to follow his sentence for attempt (first degree murder). In July 2010, defendant filed a *pro se* postconviction petition, and the State filed a motion to dismiss. In December 2013,

postconviction counsel filed an amended petition, which the trial court dismissed in June 2014.

¶ 3 On appeal, defendant argues the trial court erred in dismissing his amended postconviction petition. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In December 2002, the State charged defendant by information in case No. 02-CF-933 with single counts of attempt (first degree murder) (720 ILCS 5/9-1(a)(1) (West 2002)) and heinous battery (720 ILCS 5/12-4.1 (West 2002)). The State alleged defendant committed the offense of attempt (first degree murder) in that, with the intent to commit first degree murder, he performed an act constituting a substantial step toward the commission of that offense by administering thallium to Alice Minter and poisoning her.

¶ 6 The State also charged defendant by information in case No. 02-CF-979 with three counts of heinous battery and four counts of aggravated battery (720 ILCS 5/12-4(c) (West 2002)) as to other victims. The State alleged defendant committed the offense of aggravated battery when, while committing a battery, he knowingly administered or caused Cortez McNutt, Karen Pendergrass, Phelandis Minter, and Andrea Adeniji to take thallium, an intoxicating or poisonous substance, without their consent. In April 2005, the State amended the aggravated-battery charges as to McNutt, Pendergrass, Minter, and Adeniji. The State also charged defendant with the related offense of aggravated battery as to Damian Minter, Rene Stewart, and Tavius Minter. The State later dismissed the heinous-battery charges in both cases. The State also moved to have the cases tried together on the theory of transferred intent and a common plan.

¶ 7 In October 2003, defendant filed a motion *in limine* to preclude references to prior bad acts, uncharged conduct, and inflammatory hearsay. Defendant also sought to suppress

evidence taken from his residence. He claimed no probable cause existed for a search warrant and the warrant affidavit contained false and misleading information.

¶ 8 In February 2004, the trial court denied the motion to suppress, finding probable cause existed for the issuance of the search warrant. The court also granted defendant's motion *in limine*, in part, but permitted the State to introduce other-crimes evidence pertaining to Raydeane Routen's 1996 complaints to police regarding defendant to show motive, intent, absence of mistake, and *modus operandi*.

¶ 9 In September 2005, defendant's jury trial commenced. Elan Weizman, president of Advanced Scientific and Chemical, located in Florida, testified his company distributes chemicals, including thallium sulfate, for research, development, and manufacturing purposes. On July 31, 2002, Weizman took a call from a man identifying himself as defendant for an order of 50 grams of thallium sulfate. The caller stated the chemical was for research and gave his home address in Springfield, Illinois.

¶ 10 Alice Minter testified she started dating defendant in 1999. Defendant was "very possessive" during the relationship and even bought her a cell phone and a pager to always know where she was. At some point, they became engaged and made plans to build or buy a house together. During the summer of 2002, when Minter and defendant were experiencing "ups and downs" in their relationship, defendant told her she would be "six feet under" if she left him. In August 2002, Minter began experiencing pains in her stomach, back, and chest. In September 2002, Minter's health went "downhill." She began losing her hair, and her back continued to hurt. She was hospitalized, and defendant would bring her food and drink. Minter's health steadily worsened, and she eventually went into a coma.

¶ 11 On cross-examination, Minter testified defendant told her early in their

relationship that he was having a child by another woman. She also stated she lived near Lasley Disposal. At times, she would get mice in her garage.

¶ 12 Springfield police officer Norvel Melton testified he executed a search warrant at defendant's house in October 2002. He found a bottle containing a white powdery substance marked as thallium sulfate. He also found bottles labeled as potassium chlorate, mercury, sulfuric acid, and chloroform.

¶ 13 Springfield police detective Paul Carpenter testified he participated in the search of defendant's residence and found an open cardboard box with shipping labels and an invoice for thallium. He also found containers of potassium chloride, methyl alcohol, potassium iodine, potassium ferricyanide, ammonium hydroxide, sodium chloride, potassium hydroxide, glacial acetic acid, and calcium carbide.

¶ 14 Springfield police detective James Graham testified he participated in the search of defendant's residence. One of the items he seized was a glass saltshaker on the kitchen counter next to the refrigerator. The contents later tested positive for thallium. A small pill bottle on top of defendant's refrigerator contained a liquid that tested positive for thallium.

¶ 15 Janet Winkler, a registered nurse with the Springfield Public Health Department, testified she participated in the inspection of Minter's house in October 2002. She became aware that a dog belonging to Minter's son had stayed in the garage, became ill, and died. Winkler observed the garage contained multiple trash bags that had been torn open. Winkler collected food samples and other substances from the garage.

¶ 16 Patrick Buckley testified he worked as an environmental inspector for the Building and Zoning Department in October 2002. He investigated the alleged thallium poisoning and learned thallium was once used to control pests and rodents. He went to Minter's

residence to determine whether anyone had access to rat poison.

¶ 17 Karen Pendergrass testified she had her hair done at Minter's house in late August 2002. While she was there, Pendergrass had two cups of lemonade or tea. Approximately a week later, Pendergrass noticed her hair "beginning to shed." She also experienced "excruciating pain" in her back. Pendergrass later learned she had been poisoned with thallium.

¶ 18 Damian Minter, Minter's son, testified he became ill in October 2002 and had a "weak" feeling in his legs. He later learned he had been poisoned with thallium.

¶ 19 Tavius Minter, Minter's son, testified his hair began falling out in September 2002. At the time, he was living with his mother at her house, and they had their meals there. When his mother became ill, Tavius called his brother Phelandis, who came up from Arkansas with his dogs. The dogs were kept in the garage. One dog went missing, and the other died. Tavius later learned he had been poisoned with thallium.

¶ 20 Phelandis Minter testified defendant would bring food and drinks to his mother in the hospital. Phelandis stated he would snack on the food, as his mother oftentimes would not eat it. He kept his dog in the garage, but it "got real sick" and lost a lot of weight. The dog eventually died. Phelandis later learned he had been poisoned with thallium.

¶ 21 Andrea Adeniji testified she is Minter's niece. She had been at Minter's house in late August 2002 and drank tea while there. Sometime later, Adeniji began losing her hair. She later learned she had been poisoned with thallium.

¶ 22 Rene Stewart, a close friend of Minter, testified she would visit her when she was sick in September 2002. Stewart would eat or drink while there. Stewart became ill and was hospitalized in late September. She later tested positive for thallium poisoning.

¶ 23 Cortez McNutt, Minter's nephew, testified defendant brought apple juice to

Minter's hospital room. McNutt drank some of the juice and "immediately" began having stomach pain. He later learned he had been poisoned with thallium.

¶ 24 Dr. Daniel Brown testified as an expert in toxicology, the study of poisonous substances. He stated thallium is a metal and found in small quantities in the environment. Thallium sulfate had been used as a rodent and ant killer until the 1970s or 1980s. It has no particular odor, and small amounts dissolve in water. A gram of thallium, "like a quarter of a thimble full," could kill an average person. Symptoms of thallium poisoning include gastrointestinal pain, muscle weakness, numbness of the hands and feet, headache, liver and kidney damage, and hair loss. Dr. Brown also testified to the adverse effects of exposure to mercury, chloroform, potassium chloride, and potassium ferricyanide.

¶ 25 Dr. Brown testified Minter's blood showed a thallium level of 471 nanograms per milliliter. A normal person would show three to five nanograms per milliliter. Dr. Brown opined Minter's amount would be expected of someone experiencing intoxication and tissue damage from thallium. Blood and urine samples taken from defendant in October 2002 showed readings consistent with somebody who had not been exposed to thallium.

¶ 26 Dr. Christopher Long testified as an expert in forensic toxicology. He tested the contents of a glass saltshaker, which indicated the presence of thallium. He also tested white powder in several glass bottles that showed the presence of thallium. A 50-gram bottle of thallium sulfate tested positive for thallium, and 20 grams remained. Dr. Long opined defendant's urine sample from October 2002 showed an exposure to thallium that was consistent with someone who worked with the product, as opposed to ingesting it.

¶ 27 David Hurrelbrink testified he was a Springfield police officer in March 1996, when he received a dispatch that Raydeane Routen believed her ex-boyfriend was parked next to

her car at a local hotel. Hurrelbrink identified defendant as the man sitting in the vehicle next to Routen's. After defendant was taken into custody, Hurrelbrink examined Routen's car and noticed the "vents on the dashboard had been broken" and "a gooey white powdery-type substance" was inside the vent.

¶ 28 Springfield police officer Ronald Gillette testified Routen came into the police station in May 1996 to report she found an unknown substance inside her vehicle. Gillette looked in her car and noticed "a silver liquid substance on the dash, the center console, and the seats and the floor area." Gillette described the substance as liquid "in small balls."

¶ 29 Springfield police officer James Gray testified Routen came to the police station in January 1996 and complained of an "unknown substance" in her car. An evidence technician inspected the car and called the fire department.

¶ 30 Raydeane Routen testified she had a dating relationship with defendant between 1992 and 1995. She described defendant as "very possessive," "demanding," and "controlling." On January 23, 1996, she received a phone call from defendant. Later that day, she entered her car and noticed a "strong odor." She then drove the car to the police station. On March 3, 1996, she was staying at a local hotel when she noticed defendant near her vehicle. She stated the vents in her car had not been damaged previously. On May 23, 1996, she noticed a substance that looked "silvery" and "beady" with a strong odor. She drove the car to the police station.

¶ 31 On cross-examination, Routen testified she did not see defendant near her car on January 23, 1996, or on May 23, 1996. She was aware defendant was not arrested in connection with those incidents. The parties stipulated the substances recovered in Routen's car testified positive for chlorine (January 1996), potassium sulfate and potassium cyanide (March 1996), and mercury (May 1996).

¶ 32 The trial court found defendant knowingly and voluntarily sought to exercise his constitutional right not to testify. Following closing arguments, the jury found defendant guilty of attempt (first degree murder) as to Minter and aggravated battery as to the seven other victims.

¶ 33 In October 2005, defendant filed a motion for a judgment of acquittal or, in the alternative, for a new trial. In April 2006, defendant's new attorney filed a supplemental posttrial motion, alleging trial counsel's ineffective assistance. Therein, the motion claimed trial counsel was ineffective for telling the jury defendant would testify but later convincing him not to do so.

¶ 34 In May 2006, the trial court conducted a hearing on the posttrial motion. John Rogers, defendant's trial counsel, testified he told the jury during his opening statement that defendant would testify. Prior to the start of the trial, Rogers stated defendant intended to testify. However, as the trial developed, Rogers recommended that defendant not testify.

¶ 35 Defendant testified Rogers did not go over the pros and cons of testifying and called Rogers a liar. Defendant stated he "very much" wanted to testify at trial.

¶ 36 In June 2006, the trial court denied the posttrial motion. Thereafter, the court sentenced defendant to 25 years in prison for the attempt (first degree murder) conviction. As to the seven aggravated-battery convictions, the court imposed consecutive two-year terms on each conviction. The aggravated-battery convictions were also to be served consecutively to the attempt conviction. In July 2006, defendant filed a motion for reduction and modification of the sentence, which the court denied.

¶ 37 On direct appeal, defendant argued (1) the trial court erred in concluding probable cause existed to issue a search warrant, (2) false statements and material omissions in the warrant affidavit required suppression of certain evidence, (3) the court erred in admitting other-crimes evidence, (4) the court erred in admitting chemical evidence, and (5) the court erred in imposing

consecutive sentences. This court affirmed in part, vacated that portion of the sentencing order imposing consecutive sentences on the aggravated-battery convictions, and remanded for a new sentencing order imposing concurrent sentences to follow defendant's sentence for attempt (first degree murder). *People v. Fayemi*, No. 4-06-0729 (June 18, 2009) (unpublished order under Supreme Court Rule 23).

¶ 38 In July 2010, defendant filed a *pro se* petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2010)). The trial court appointed counsel and directed the State to respond. In August 2010, the State filed a motion to dismiss, arguing waiver, *res judicata*, and lack of record support.

¶ 39 In December 2013, defense counsel filed an amended postconviction petition. Therein, counsel alleged, *inter alia*, that trial counsel was ineffective for making promises in his opening statement that were not kept. The amended petition also alleged appellate counsel was ineffective for failing to raise the issue on direct appeal.

¶ 40 In May 2014, the trial court conducted a hearing on the State's motion to dismiss. In its June 2014 written order, the court stated none of defendant's allegations showed unreasonable assistance by trial counsel or prejudice. After finding defendant failed to make a substantial showing of a constitutional violation, the court granted the State's motion to dismiss. This appeal followed.

¶ 41 II. ANALYSIS

¶ 42 Defendant argues the trial court erred in dismissing his amended postconviction petition, contending he made a substantial showing his trial attorney was ineffective for promising the jury that it would hear defendant's testimony while simultaneously advising his client not to take the stand. We disagree.

¶ 43 The Act "provides a mechanism for criminal defendants to challenge their convictions or sentences based on a substantial violation of their rights under the federal or state constitutions." *People v. Morris*, 236 Ill. 2d 345, 354, 925 N.E.2d 1069, 1075 (2010). A proceeding under the Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *People v. English*, 2013 IL 112890, ¶ 21, 987 N.E.2d 371. The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008).

¶ 44 The Act establishes a three-stage process for adjudicating a postconviction petition. *English*, 2013 IL 112890, ¶ 23, 987 N.E.2d 371. At the first stage, the trial court must review the postconviction petition and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2012). If the petition is not dismissed at the first stage, it advances to the second stage. 725 ILCS 5/122-2.1(b) (West 2012).

¶ 45 At the second stage, the trial court may appoint counsel, who may amend the petition to ensure defendant's contentions are adequately presented. *People v. Pendleton*, 223 Ill. 2d 458, 472, 861 N.E.2d 999, 1007 (2006). Also at the second stage, the State shall file an answer or move to dismiss the petition. 725 ILCS 5/122-5 (West 2012). A petition may be dismissed at the second stage "only when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation." *People v. Hall*, 217 Ill. 2d 324, 334, 841 N.E.2d 913, 920 (2005). If a constitutional violation is established, "the petition proceeds to the third stage for an evidentiary hearing." *People v. Harris*, 224 Ill. 2d 115, 126, 862 N.E.2d 960, 967 (2007). In this case, the State filed a motion to dismiss, and the court granted that motion. We review the trial court's second-stage dismissal *de novo*. *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008.

¶ 46 A defendant's claim of ineffective assistance of counsel is analyzed under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Cathey*, 2012 IL 111746, ¶ 23, 965 N.E.2d 1109. To prevail on such a claim, "a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Petrenko*, 237 Ill. 2d 490, 496, 931 N.E.2d 1198, 1203 (2010). To establish deficient performance, the defendant must show his attorney's performance fell below an objective standard of reasonableness. *People v. Evans*, 209 Ill. 2d 194, 219, 808 N.E.2d 939, 953 (2004) (citing *Strickland*, 466 U.S. at 687-88). Prejudice is established when a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Evans*, 209 Ill. 2d at 219-20, 808 N.E.2d at 953 (citing *Strickland*, 466 U.S. at 694). A defendant must satisfy both prongs of the *Strickland* standard, and the failure to satisfy either prong precludes a finding of ineffective assistance of counsel. *People v. Clendenin*, 238 Ill. 2d 302, 317-18, 939 N.E.2d 310, 319 (2010).

¶ 47 In the case *sub judice*, defense counsel told the jury in his opening statement that the "truth in this case *** lies in the detail of what was really going on in [defendant and Minter's] relationship at this time, and you will hear evidence from the Defense about what that was." Counsel stated defendant had a journal and "kept meticulous notes about things that [were] going on in his life," which would allow the defense to present evidence "detailing exactly what was going on between the two of them in their lives at this time in the year 2002." Counsel also stated defendant "will testify" regarding food shared and eaten in the hospital. In the defense case, however, defendant elected not to testify.

¶ 48 Defendant argues counsel's conduct was prejudicial because counsel made a promise to the jury that went unfulfilled, which ultimately encouraged the jury to draw negative

inferences when he did not testify.

> "A defense counsel's failure to present testimony as promised, while a serious deficiency, does not constitute ineffectiveness *per se*. [Citation.] A defendant must still show that his or her counsel's error resulted in prejudice. [Citation.] The test is not whether defense counsel fulfilled every promise made during opening statements, but whether any error by counsel was so grave that had the error not occurred, the result of the case would likely have been different." *People v. Winkfield*, 2015 IL App (1st) 130205, ¶ 20, 41 N.E.3d 641.

¶ 49 Here, the State's evidence of defendant's guilt was overwhelming. The jury heard testimony that Minter and seven of her friends and family members suffered from thallium poisoning. The only individual close to Minter who did not suffer from acute thallium poisoning was defendant. During Minter's illness, defendant brought her food and drink. She also testified defendant told her she would be "six feet under" if she left him. Defendant purchased thallium from a chemical company in Florida, and investigators found thallium in a saltshaker seized from defendant's house, along with bottles labeled as potassium chlorate, mercury, sulfuric acid, and chloroform. Defendant's previous girlfriend testified to defendant's "possessive" and "controlling" nature and detailed instances of chlorine, potassium sulfate, potassium cyanide, and mercury being found in her car after their relationship had ended.

¶ 50 Even if we were to find trial counsel's opening statements were objectively unreasonable, we cannot say his statements caused sufficient prejudice such that the outcome of his conviction would likely have been different absent those statements and in light of the State's

evidence. We also note the trial court instructed the jury that it was not to consider the failure of defendant to testify in arriving at its verdict, and "[t]he jury is presumed to follow the instructions that the court gives it." *People v. Taylor*, 166 Ill. 2d 414, 438, 655 N.E.2d 901, 913 (1995). As defendant has not established the prejudice prong of the *Strickland* standard, his claim of ineffective assistance of trial counsel fails. Moreover, appellate counsel cannot be said to have been ineffective for not raising this issue on direct appeal. Accordingly, we find the trial court did not err in granting the State's motion to dismiss defendant's amended postconviction petition.

¶ 51 III. CONCLUSION

¶ 52 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 53 Affirmed.