FILED
February 23, 2018
Carla Bender
4th District Appellate
Court, IL

2018 IL App (4th) 141032-B

NO. 4-14-1032

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DAMIEN M. HANSBROUGH, Defendant-Appellant.	))))))))	Appeal from Circuit Court of McLean County No. 12CF470 Honorable Scott D. Drazewski, Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Steigmann and DeArmond concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding (1) the trial court did not abuse its discretion when sentencing defendant based on its personal policy based on deterrence; and (2) the record is incomplete or inadequate for resolving defendant's ineffective-assistance-of-counsel claim on direct appeal.

¶ 2 This court, in *People v. Hansbrough*, 2016 IL App (4th) 141032-U, concluded (1) the trial court did not abuse its discretion in sentencing defendant based on its personal sentencing policy; and (2) the record was insufficient to decide defendant's claim of ineffective assistance of counsel. On September 27, 2017, by supervisory order, the Illinois Supreme Court vacated this court's judgment and ordered us to reconsider defendant's ineffective-assistance-of-counsel claim in light of its recent decision in *People v. Veach*, 2017 IL 120649 (*Veach II*). See *People v. Hansbrough*, No. 121765 (Ill. Sept. 27, 2017) (nonprecedential supervisory order on

denial of petition for leave to appeal). After reconsidering defendant's appeal in light of *Veach II*, we continue to affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Trial Court Proceedings

¶ 5 Following two controlled buys, defendant was indicted in May 2012 with multiple counts of unlawful delivery of a controlled substance, the substance being cocaine. While in custody, defendant was questioned by Detective Todd McClusky who, at the outset of the interview, informed defendant (1) he had the right to remain silent; (2) he had the right to an attorney; and (3) if he was unable to afford an attorney, one would be provided to him. During the interview, defendant orally waived his fifth amendment rights and proceeded to give statements consistent with the controlled buys. However, he denied delivering cocaine during the controlled buys, maintaining that he delivered cannabis. Prior to trial, the State dismissed two counts of the indictment against defendant. Ultimately, the State went to trial on two counts of unlawful delivery of a controlled substance (cocaine), a Class 2 felony (720 ILCS 570/401(d) (West 2012)), and two counts of unlawful delivery of a controlled substance within 1,000 feet of a public park, a Class 1 felony (720 ILCS 570/407(b)(2) (West 2012)).

¶ 6 In September 2014, the case proceeded to a bench trial. During trial, the State presented testimony from law enforcement officers involved in the controlled buy as well as the confidential source, Lisa Hibbard, who purchased the cocaine from defendant during the controlled buys. Detective McClusky gave testimony outlining defendant's custodial statements. The State admitted, without objection, a digital video disc of defendant's custodial interrogation as well as a transcript of the same. The trial court found defendant guilty of all counts but

merged the Class 2 felony unlawful delivery of a controlled substance counts with the Class 1 felony counts of unlawful delivery of a controlled substance with 1,000 feet of a public park (720 ILCS 570/407(b)(2) (West 2012)).

¶ 7 In November 2014, the trial court sentenced defendant to concurrent 10-year prison terms on each count of the Class 1 felony of unlawful delivery of a controlled substance within 1,000 feet of a public park (720 ILCS 570/407(b)(2) (West 2012)).

¶ 8 B. Appellate Court Proceedings

¶ 9 During the initial appeal, defendant argued (1) the trial court abused its discretion by adhering to a personal sentencing policy and (2) his attorney provided ineffective assistance of counsel by failing to suppress defendant's recorded statements to police. *Hansbrough*, 2016 IL App (4th) 141032-U, ¶ 16 (*Hansbrough I*).

¶ 10 1. *Sentencing Issue*

¶ 11 With respect to the sentencing issue, we concluded the trial court did not abuse its discretion by telling defendant " 'I don't go backwards as far as giving a lesser sentence than someone received earlier.' " *Id*. ¶ 26. Defendant argued because he had previously received a six-year sentence, the court ignored the statutory framework by considering a sentencing range from 6 to 30 years, rather than the 4 to 30 years provided by statute. See 730 ILCS 5/5-4.5-30 (West 2012); 720 ILCS 570/408(a) (West 2012). *Hansbrough I*, 2016 IL App (4th) 141032-U, ¶ 26. We rejected that argument, concluding the trial court did not misunderstand or ignore the statutory guidelines; rather, the court based its decision on the aggravating factors heard at sentencing, including the need for deterrence and defendant's prior criminal history. *Id*. ¶ 27. This question was not in dispute before the supreme court and we therefore continue to affirm

the trial court with respect to this issue.

¶ 12 2. *Ineffective Assistance of Counsel*

¶ 13 With respect to the ineffective-assistance-of-counsel claim, defendant argued defense counsel was ineffective for failing to file a motion to suppress his statements made to Detective McClusky when he received imperfect admonishments under *Miranda v. Arizona*, 384 U.S. 436, 467-70 (1966)—specifically, that any statements might be used against him. *Id*. at 469. In determining whether defendant's claim of ineffective assistance of counsel should be addressed on direct appeal, we applied this court's reasoning in *People v. Veach*, 2016 IL App (4th) 130888, 50 N.E.3d 87 (*Veach I*), which was later reversed by the supreme court in *Veach II*, 2017 IL 120649.

¶ 14 In *Veach I*, this court attempted to divide ineffective-assistance-of-counsel claims into three categories. *Veach I*, 2016 IL App (4th) 130888, ¶ 72. Category A cases included those cases in which the record on appeal was not sufficient to resolve the defendant's contention. *Id*. ¶¶ 72, 74. This court determined a reviewing court should decline to hear those claims on direct appeal, but rather wait until a complete record is developed during postconviction proceedings. *Id*. ¶ 75.

¶ 15 Category B cases included direct appeals where the ineffective-assistance claim was clearly groundless, even if the trial court record failed to address the claim. *Id*. ¶ 72. In those instances, the reviewing court could address the claim on direct appeal. *Id*. ¶ 82. In Category C cases, the reviewing court could address a claim of ineffective assistance of counsel on direct appeal where counsel committed an egregious error. *Id*. ¶ 72. Category C cases could be addressed even without a sufficient record because no justifiable reason could support the

attorney's error. *Id.* ¶ 85.

¶ 16 We reiterated these categories in *Hansbrough I* and concluded the case fell under Category A. *Hansbrough I*, 2016 IL App (4th) 141032-U, ¶ 20. We stated, "We are unable to conduct a meaningful review because the lack of information prevents us from determining whether the decision not to seek suppression was an error or strategy. If we cannot first determine whether an error actually occurred, we cannot conduct the ineffective-assistance analysis outlined in *Strickland*." *Id.*

¶ 17 C. *Veach II*

¶ 18 After we issued our decision in *Hansbrough I*, the supreme court issued its opinion in *Veach II*. In *Veach II*, the supreme court rejected this court's attempt to categorize ineffective-assistance-of-counsel claims in *Veach I*. *Veach II*, 2017 120649, ¶ 48. Rather, the supreme court held claims for ineffective assistance should be reviewed on direct appeal unless "the record is incomplete or inadequate for resolving the claim." *Id.* ¶ 46. The court emphasized the importance of addressing ineffective-assistance claims on a case-by-case basis rather than attempting to place those cases in specific categories. *Id.* ¶ 48.

¶ 19 On remand, the supreme court ordered us to reconsider defendant's ineffective-assistance-of-counsel claim in light of its *Veach II*. *People v. Hansbrough*, No. 121765, 2017 WL 4386373 (2017) (nonprecedential supervisory order on denial of petition for leave to appeal).

¶ 20 II. ANALYSIS

¶ 21 On remand, we must determine whether our initial holding warrants a different result in light of the supreme court's decision in *Veach II*. We therefore reexamine whether the

record was sufficient for us to reach the merits of defendant's ineffective-assistance-of-counsel claim.

¶ 22 In this case, defendant argues his attorney provided ineffective assistance of counsel by failing to file a motion to suppress defendant's statements to police where the recorded interview demonstrates defendant was not told that anything he said could be held against him.

¶ 23 The United States Supreme Court has interpreted the fifth amendment to require four admonitions prior to a custodial interrogation: (1) the right to remain silent; (2) any statement made may be used against the suspect in a court of law; (3) the right to an attorney; and (4) if the suspect cannot afford an attorney, one will be provided. *Miranda*, 384 U.S. at 467-70; see also U.S. Const., amend V. While there are no "magic words" that must be recited in order to comport with the fifth amendment, all four of these rights must be conveyed to a suspect prior to a custodial interrogation. *Florida v. Powell*, 559 U.S. 50, 60 (2010).

¶ 24 Additionally, the sixth amendment guarantees criminal defendants effective assistance of counsel. U.S. Const., amend VI. To prevail on a claim of ineffective assistance of counsel, a defendant must show (1) counsel's performance fell below an objective standard of reasonableness and (2) the deficient performance resulted in prejudice to the defendant such that, but for counsel's errors, a different result would have been reached. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We should review claims of ineffective assistance of counsel on direct appeal unless "the record is incomplete or inadequate for resolving the claim." *Veach II*, 2017 IL 120649, ¶ 46. "Our supreme court has noted that when 'an ineffectiveness claim is based on counsel's failure to file a suppression motion, in order to establish prejudice under

Strickland, the defendant must demonstrate that the unargued suppression motion is meritorious, and a reasonable probability exists that the outcome would have been different had the evidence been suppressed.' " *People v. Fellers*, 2016 IL App (4th) 140486, ¶ 33 (quoting *People v. Henderson*, 2013 IL 114040, ¶ 15, 989 N.E.2d 192).

¶ 25 Defendants claiming ineffective assistance of counsel must overcome a strong presumption that counsel's conduct was reasonable and effective. *Strickland*, 466 U.S. at 689. Our supreme court has "made it clear that a reviewing court will be highly deferential to trial counsel on matters of trial strategy, making every effort to evaluate counsel's performance from his perspective at the time, rather than through the lens of hindsight." *People v. Perry*, 224 Ill. 2d 312, 344, 864 N.E.2d 196, 216 (2007).

¶ 26 During the recorded interview presented as evidence to the trial court, Detective McClusky read defendant's *Miranda* rights, but he omitted the warning that anything defendant said could be used against him. Defendant argues the lack of *Miranda* warnings on the video demonstrates he was never read his rights. However, the recording appears to pick up after some interaction between Detective McClusky and defendant, and Detective McClusky further testified the recording had been redacted prior to the trial.

¶ 27 As the State points out, "[t]he exact time and place of the arrest and any procedures prior to the creation of the [recording] are unknown." We also do not know if defense counsel was privy to what occurred during the totality of defendant's interactions with police, such as whether he was properly read his *Miranda* rights at any point prior to the recorded interview. Based on this unknown information, we cannot be certain that defense counsel provided ineffective assistance of counsel. We therefore conclude "the record is

incomplete or inadequate for resolving the claim" at this time. See *Veach II*, 2017 IL 120649, ¶ 46. Rather, we would be in a better position to review the matter following postconviction proceedings, where defendant can develop a complete record for our review.

¶ 28 III. CONCLUSION

¶ 29 For the reasons stated, we affirm the trial court's judgment regarding defendant's sentence and decline to address defendant's ineffective-assistance-of-counsel claim on direct appeal. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2016).

¶ 30 Affirmed.