2017 IL App (1st) 142234-U
Order filed: October 13, 2017

FIFTH DIVISION

No. 1-14-2234

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. 11 CR 5293
	)	
LARRY CARTER,	)	Honorable
	)	Thaddeus L. Wilson,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Reyes and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 ***Held*:** We affirmed the summary dismissal of defendant's postconviction petition, which claimed ineffective assistance of trial counsel for failing to present an affirmative defense of self-defense at trial, where the claim was defaulted for failure to raise it on direct appeal; and it was not arguable that defendant was prejudiced.

¶ 2 Following a jury trial, defendant Larry Carter was convicted of first degree murder and sentenced to 55 years' imprisonment. We affirmed defendant's conviction on direct appeal. See *People v. Carter*, No. 1-10-1378 (2012) (unpublished order under Supreme Court Rule 23). Defendant now appeals from the summary dismissal of his *pro se* postconviction petition, which

alleged that trial counsel rendered ineffective assistance by not asserting the affirmative defense of self-defense at trial. We affirm.

¶ 3 Defendant was charged with first degree murder for the June 2, 2005, fatal shooting of Howard Williams where defendant personally discharged a firearm proximately causing Mr. Williams' death. In defendant's 2009 discovery answers, trial counsel did not raise the affirmative defense of self-defense.

¶ 4 In her opening statement at the 2010 trial, trial counsel asserted that the State's evidence would consist of the testimony of two eyewitnesses, Khalid and Malachi Crockerhan, who were "not innocent bystanders," but "two brothers who have everything to lose." According to trial counsel, "Khalid [was] the one [who] had the gun. Khalid [was] the one who pulled the trigger and shot his friend in the head." Additionally, trial counsel asserted that defendant was "an innocent man" who fled with Mr. Williams' vehicle only "because Khalid had pulled a gun on him." and that defendant "[ran] for his life knowing that he [was] the sacrificial lamb, that these brothers [were] going to make up a tale and point [a] finger at him."

¶ 5 At trial, the State presented Khalid and Malachi as witnesses. The brothers testified that they had known defendant and Mr. Williams for years, but were closer to Mr. Williams. In the early morning hours of June 2, 2005, the four men socialized and drank alcohol at several locations, including Mr. Williams' home. At about 4 a.m., Mr. Williams agreed to drive Khalid and Malachi to their automobile. As the four men entered Mr. Williams' vehicle, defendant told Malachi: "You lucky [Mr. Williams is] your guy, or I get him." Malachi and Khalid believed defendant's threat against Mr. Williams was not genuine because defendant and Mr. Williams had not argued. During their ride, Malachi was in the front passenger seat, and Khalid and defendant were seated in the rear passenger seats.

¶ 6 When they reached their parked vehicle, Khalid and Malachi began to exit Mr. Williams' automobile. Khalid testified that, out of the corner of his eye, he saw a hand holding "a chrome piece." The chrome piece was "coming down from where [Mr. Williams] was sitting." Khalid jumped out of the vehicle and began screaming at defendant: "What did you do? What is you doing?" Defendant exited the car. Then defendant came around the rear of the car, opened up the driver side door, grabbed Mr. Williams under his shoulders, and placed him on the ground. Defendant jumped back in the car, looked at Khalid and Malachi, and said: "Come on." Khalid did not respond; defendant sped off.

¶ 7 Before the police arrived at the scene, defendant called Khalid on his cell phone and defendant told Khalid he was sorry that Khalid "had to see that." Khalid asked defendant why he had killed Mr. Williams. Defendant replied that he had killed Mr. Williams because he was "hungry."

¶ 8 On cross examination, Khalid testified that defendant was not Mr. Williams' "enemy" and that, before the shooting, defendant did not fight with Mr. Williams.

¶ 9 Malachi Crockerhan testified that, as he opened the passenger side door to exit Mr. Williams' vehicle, he heard a gunshot and saw Mr. Williams' head move backward and then forward in a slumped position. Malachi saw defendant's "arm coming back" and that defendant was holding a "chrome silver" revolver. Prior to the shooting, Malachi had been unaware that defendant was in possession of a gun.

¶ 10 On cross examination, Malachi testified he noticed no animosity between defendant and Mr. Williams prior to the shooting, nor was there any animosity between defendant and Khalid. Malachi testified that Khalid did not have a gun with him on that day.

¶ 11 The parties stipulated that if called to testify, Doctor Wendy Lavezzi, an assistant medical

examiner for the Cook County Medical Examiner's Office, would testify that, on June 2, 2005, she conducted a post-mortem examination of Mr. Williams. She observed blood emanating from his right ear and a gunshot-wound entrance on the right side of his head. The entrance wound was 3.5 inches beneath the top of the head and 5.1 inches to the right of the anterior midline. There was evidence of close contact range firing, indicating "the gun was positioned just a few inches or possibly slightly touching" Mr. Williams' head when it was fired. In her opinion, the cause of death was a gunshot wound to the head and brain and the manner of death was homicide.

¶ 12 Police and forensic witnesses testified (in person and by stipulation) that Mr. Williams' vehicle was found parked on a street on June 6, 2005, and gunshot residue and Mr. Williams' blood were found inside.

¶ 13 Defendant was arrested in North Carolina in 2008.

¶ 14 Defendant testified that he was friends with Mr. Williams and the Crockerhans for years. In June 2005, Mr. Williams owed Khalid $600. Khalid was "kind of angry" because Mr. Williams had not paid him the money he owed. Prior to the shooting, defendant, Mr. Williams, and the Crockerhans socialized at Mr. Williams' home. At some point, they were all together while Mr. Williams drove Khalid and Malachi to Khalid's vehicle. Malachi was in the front passenger seat, and defendant and Khalid were in the rear passenger seats. Defendant denied telling Malachi: "You're lucky that's your guy or I'd get him." When Mr. Williams stopped the vehicle, all of the men began to exit. Defendant then saw Khalid aiming a gun at his face from about a foot away. He and Khalid "tussled;" "a hand tussle." Defendant testified that he used both of his hands to try to push away Khalid's hand. Defendant demonstrated to the jury how he pushed Khalid's hands toward the front passenger seat.

¶ 15 The State then objected to this testimony on the ground that trial counsel had not raised an affirmative defense of self-defense and the trial court conducted a sidebar conference. In response to the State's objection, trial counsel stated that defendant was not going to testify that he fired the gun. Instead, defendant would testify that Khalid brandished the gun and defendant attempted to disarm Khalid by pushing Khalid's hand away. The gun fired while it was in Khalid's hands. She stated: "That's neither self-defense or defense of another. It's an accident." Trial counsel further explained that defendant did not fire the gun and did not commit the murder. Trial counsel made the strategic decision to not raise a self-defense theory after doing research, discussing the issue with attorneys in her office, and learning what Mr. Carter would testify to at trial. In response to a question from the court, trial counsel stated that she did not intend to seek instructions on self-defense or second-degree murder. The trial court allowed trial counsel to examine defendant in this vein with that understanding.

¶ 16 When he resumed his testimony, defendant testified that he struggled with Khalid for mere seconds. Defendant testified:

> "Q. [Defense attorney:] And what happened then?
>
> A. [Defendant:] After like maybe one push, the gun went off.
>
> Q. Okay. What–how did you push the gun?
>
> A. Like away from me. Towards–towards like the front passenger[] seat.
>
> Q. And the gun went off. *** Where were your hands when the gun went off?
>
> A. On Khalid's hands.
>
> Q. Where were Khalid's hands?
>
> A. Khalid's hand was on the gun.
>
> * * *

Q. Did you ever fire that gun?

A. No, ma'am.

* * *

Q. Do you know how it is that the gun went off?

A. Khalid's finger was on the trigger."

¶ 17 Defendant and Khalid continued to struggle after the gun went off. Eventually, Khalid released the gun and it flew over the front seat toward the front passenger side door. Khalid exited the rear passenger side door. Defendant jumped over the front seat and saw that Mr. Williams was slumped over toward the front driver side door. Defendant pushed Mr. Williams, and he fell out of the car. In fear for his life, defendant drove away.

¶ 18 Defendant never told Khalid that he was "hungry." Defendant subsequently fled to North Carolina because he feared Khalid.

¶ 19 The State called Khalid and Malachi in rebuttal. Khalid denied that he pointed a gun at defendant or struggled with defendant over a gun. Malachi testified that he did not see Khalid and defendant struggle over a gun.

¶ 20 During the instruction conference, trial counsel sought jury instructions on involuntary manslaughter, arguing there was evidence that the shooting was reckless. The trial court denied the request after finding that defendant's account of the incident did not support a conscious disregard of unjustifiable risk, as required for a finding of recklessness.

¶ 21 In closing arguments, trial counsel argued that defendant's account of the incident—that Khalid pointed a gun at him, and Mr. Williams was shot as defendant and Khalid struggled over the gun—was more credible than the Crockerhans' account of the incident. Trial counsel also argued that "Khalid has accidentally just shot his best friend;" that "[no one] intended for the gun

to go off," and that the Crockerhans implicated defendant so that Khalid would not face any consequences. Trial counsel further argued that Khalid pointed a gun at defendant, who then was placed in the position of "trying to defend himself in the best way he could, maybe not in a good way *** a dangerous thing, a reckless thing to do." The court then struck trial counsel's comments as to recklessness.

¶ 22 Following deliberations, the jury found defendant guilty of first degree murder and that, in the commission of that offense, he personally discharged a firearm causing the death of Mr. Williams.

¶ 23 On direct appeal, defendant argued, in relevant part, that the trial court erred by refusing to instruct the jury on involuntary manslaughter, and that trial counsel rendered ineffective assistance by failing to request jury instructions on self-defense. *Carter*, No. 1-10-1378, ¶ 2.

¶ 24 As to this first argument, we noted that, the difference between first degree murder (intentionally or knowingly), and involuntary manslaughter (recklessness), is the defendant's mental state (*id*. ¶ 40). We further noted that recklessness consists of a conscious disregard for a substantial and unjustified risk. *Id*. ¶ 41. We agreed with the trial court that defendant's account of the struggle with Khalid for the gun presented no evidence of recklessness. *Id*. ¶ 44.

¶ 25 Instead, defendant testified to: a "wholly defensive maneuver in pushing Khalid's hand away from him without ever touching the weapon itself;" and a "quick defensive maneuver, in which he never even touched the weapon and pushed Khalid's hand only one time away from his face." During the brief "tussle," defendant never touched the gun; Khalid pulled the trigger. Given defendant's testimony, there was simply no evidence from which the jury could find that defendant had the requisite mental state for recklessness, *i.e.*, that he consciously disregarded a substantial and unjustifiable risk that his act of pushing Khalid's hand away would likely cause

death or great bodily harm to another. Nor was there any evidence from which the jury could find defendant's quick defensive maneuver, in which he never even touched the weapon and pushed Khalid's hand only one time away from his face, constituted "a gross deviation from the standard of care which a reasonable person would exercise in the situation." 720 ILCS 5/4-6 (West 2004).[1]

¶ 26 We further considered that the trial court not only heard all the testimony, but also saw defendant demonstrate the maneuver he used in pushing Khalid's hand away from his face. The trial court, therefore, was in a better position than this court to determine whether said maneuver constituted evidence of recklessness warranting an involuntary manslaughter instruction.

¶ 27 We concluded that defendant's testimony did not suggest evidence of recklessness and thus did not warrant an involuntary manslaughter instruction. Accordingly, the trial court did not abuse its discretion in refusing to give the instruction on involuntary manslaughter.

¶ 28 We also found that, if the trial court erred by not giving an involuntary manslaughter instruction, it was harmless error. The jury was presented with two versions of the shooting; the version of the State's witnesses, Khalid and Malachi, and defendant's version, and they chose to believe the former. *Id*. ¶ 48. "Having rejected defendant's version of the shooting, the jury would not have convicted him of involuntary manslaughter, even if such an instruction had been given." *Id*.

¶ 29 In considering defendant's argument that trial counsel was ineffective for not seeking jury instructions on self-defense, we noted that trial counsel "specifically explained to the trial court that her rationale for not requesting a self-defense instruction was because defendant

[1] Section 4-6 of the Criminal Code of 1961 provides that "[a] person is reckless or acts recklessly, when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense; and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." 720 ILCS 5/4-6 (West 2004).

testified he was trying to push Khalid's hands away when the gun accidentally fired and, thus, the shooting was accidental and not the result of self-defense." *Id*. ¶ 50. Defendant, on direct appeal, had argued that this remark showed trial counsel's misapprehension of the law that "[w]here there is evidence of self-defense in addition to evidence of accident, the defendant has the right to rely 'on an accident theory as to the ultimate injury *and* a self-defense theory as to his preceding acts.' " (Emphasis in original.) *Id*. (quoting *People v. Bedoya*, 288 Ill. App. 3d 226, 237 (1997)). However, we held that trial counsel was not ineffective because "[d]efendant's theory of self-defense, which he now claims the jury should have been instructed on, is virtually identical to the theory he presented at trial, *i.e.*, that Khalid held the gun in the vehicle and aimed it at defendant's face." However, we found no reasonable probability that self-defense instructions "would have caused the jury to make any different credibility determinations than the ones it actually made" so that defendant was not prejudiced. *Id*. ¶ 53.

¶ 30 On October 28, 2013, petitioner filed a *pro se* postconviction petition. As relevant here, defendant claimed in his petition that trial counsel had argued at trial that Mr. Williams' death was accidental "when there was evidence of self defense but [it] was not allowed at trial," and that the outcome of the trial would have been different had a "proper defense" been raised.

¶ 31 On January 24, 2014, the circuit court summarily dismissed defendant's petition. As to defendant's claim that trial counsel was ineffective for failing to raise a self-defense theory at trial, the circuit court, initially, noted that defendant, on direct-appeal, had challenged trial counsel's failure to seek jury instructions on self-defense and this court found no ineffectiveness. The circuit court concluded that the ineffectiveness claim in defendant's postconviction petition to be patently meritless as trial counsel's decision to not present a defense of self-defense was one of strategy and defendant was not prejudiced.

¶ 32 On appeal, defendant argues that his postconviction petition states the gist of a meritorious claim that trial counsel was ineffective because she failed to argue self-defense at trial and, instead, argued that the death was accidental.

¶ 33 A postconviction petition may be summarily dismissed within 90 days of its filing if "the court determines the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a) (West 2014). "A petition may be dismissed as frivolous or patently without merit only 'if the petition has no arguable basis either in law or in fact'—relying on 'an indisputably meritless legal theory or a fanciful factual allegation.' " *Allen*, 2015 IL 113135, ¶ 25 (quoting *People v. Hodges*, 234 Ill. 2d 1, 16 (2009)). At the first stage, documented factual allegations are construed liberally and accepted as true unless affirmatively refuted by the record. *Allen*, 2015 IL 113135, ¶¶ 25-26.

¶ 34 "To prevail on a claim of ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant must show both that counsel's performance 'fell below an objective standard of reasonableness' and that the deficient performance prejudiced the defense." *Hodges*, 234 Ill. 2d at 17 (2009) (quoting *Strickland*, 466 U.S. 668, 687-88 (1984)). At the first stage of postconviction proceedings, a postconviction petition which alleges ineffectiveness of counsel may not be summarily dismissed if "(i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *People v. Petrenko*, 237 Ill. 2d 490, 497 (citing *Hodges*, 234 Ill.2d at 17). Where a defendant has not suffered prejudice, we need not address whether counsel's actions were objectively reasonable. *People v. Lacy*, 407 Ill. App. 3d 442, 457 (2011).

¶ 35 We review *de novo* the summary dismissal of a postconviction petition. *Allen*, 2015 IL 113135, ¶ 19.

¶ 36 Defendant did not raise this particular claim of ineffectiveness on direct appeal. "Proceedings on a postconviction petition are collateral to conviction; 'issues that were raised and decided on direct appeal are barred from consideration by the doctrine of *res judicata*; issues that could have been raised, but were not, are considered waived.' " *People v. Allen*, 2015 IL 113135, ¶ 20 (citing *People v. Pitsonbarger*, 205 Ill.2d 444, 456 (2002)); *People v. Tate*, 2012 IL 112214, ¶ 8. As to ineffectiveness claims, this default rule applies to an "ineffective assistance claim based on what *** counsel did, in fact, do." *Id*. ¶ 14. And in *People v. Veach*, 2017 IL 120649, our supreme court admonished that ineffectiveness claims should be raised on direct appeal if apparent on the record. *Id*. ¶ 46.

¶ 37 Defendant's claim is based upon trial counsel's decision to not assert a self-defense theory at trial based on his testimony that the shooting resulted when he "tussled" with Khalid. This claim was apparent on the record, but was not raised on direct appeal. We believe defendant's claim has been defaulted.

¶ 38 Putting aside the default, we find that the petition did not set forth an arguable claim of ineffectiveness due to trial counsel's failure to raise an affirmative defense of self-defense.

¶ 39 A person is justified in the use of force in self-defense against another when it is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another. 720 ILCS 5/7-1(a) (West 2004). "We have held: '[r]aising the issue of self-defense requires as its sine qua non that defendant had admitted the killing.' " *People v. Salas*, 2011 IL App (1st) 091880, ¶ 84 (citing *People v. Lahori*, 13 Ill. App. 3d 572, 577).

¶ 40 The record shows that trial counsel made a decision to not raise the affirmative defense of self-defense after learning that defendant would testify that he did not pull the trigger of the gun,

that his hand never touched the gun, and that the gun accidentally went off during a brief "tussle" with Khalid. Trial counsel, prior to making that decision, researched the law surrounding self-defense and conferred with attorneys in her office. However, we generally do not consider trial strategy related issues when reviewing first stage dismissals of ineffectiveness claims in postconviction petitions. *Tate*, 2012 IL 112214, ¶ 22.

¶ 41 Even if it was arguable that trial counsel's decision as to self-defense fell below an objective standard of reasonableness, we find that defendant was not arguably prejudiced by that decision.

¶ 42 As we have discussed, on direct appeal, defendant did argue that trial counsel was ineffective for failing to seek jury instructions on self-defense. We found that defendant's theory of self-defense on appeal was indistinguishable from trial counsel's argument at trial that the shooting occurred accidentally when defendant pushed the gun away as Khalid pointed it toward him. We concluded that defendant was not prejudiced because the jury found the State's account—that defendant himself pulled the gun and intentionally killed Mr. Williams—to be more credible than defendant's account; *i.e.*, that his actions were committed in self-defense or were accidental.

¶ 43 We find no substantial difference between defendant's postconviction claim of ineffective assistance of trial counsel because of her failure to assert self-defense as an affirmative defense, or his claim on direct appeal of ineffective assistance of trial counsel because of her failure to seek jury instructions relating to a self-defense theory. We, again, conclude that defendant was not prejudiced as the jury rejected defendant's version of the shooting and accepted the evidence of the State that defendant intentionally shot the victim.

¶ 44 We find that the petition was properly dismissed for failing to allege defendant was arguably prejudiced by trial counsel's failure to assert an affirmative defense of self-defense.

¶ 45 Accordingly, the judgment of the circuit court is affirmed.

¶ 46 Affirmed.