2017 IL App (1st) 142718-U

No. 1-14-2718

Order filed February 24, 2017

FIFTH DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 05 CR 17860
	)	
BENJAMIN WILLIAMS,	)	Honorable
	)	Lawrence Edward Flood,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justices Lampkin and Reyes concurred in the judgment.

ORDER

¶ 1 *Held*: On State's motion, the trial court did not err in dismissing defendant's postconviction petition at the second stage where defendant failed to make a substantial showing of a constitutional violation of ineffective assistance of counsel.

¶ 2 Defendant Benjamin Williams appeals the trial court's order granting the State's motion to dismiss his postconviction petition for relief filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). He contends that the trial court erred in

dismissing his petition because he made a substantial showing that his trial counsel was ineffective for failing to request a self-defense or second degree murder jury instruction. We affirm.

¶ 3 Following a jury trial, defendant was convicted of first degree murder (720 ILCS 5/9-1(A)(1) (West 2004)) and sentenced to 46 years in the Illinois Department of Corrections (IDOC). We set forth the facts of the case in our decision from defendant's direct appeal (*People v. Williams*, 391 Ill. App. 3d 257 (2009)), and we recount them here to the extent necessary to resolve defendant's current appeal. Defendant and his codefendant Derrick Skipper[1] were charged with the murder of the victim, John Riley. Defendant and Skipper knew Riley and his brother, Pierre Riley, from their neighborhood. At trial, Pierre, a convicted felon, testified that on June 30, 2005, in the course of an argument, defendant stole $10 from him. Pierre related the incident to Riley, his uncle Ronald Daniels, and Gregory Hollis at a nearby park. The men confronted defendant about taking Pierre's money. Pierre testified that the confrontation was "kind of intense." Following the confrontation, the men returned to the park.

¶ 4 Ronald Daniels, a convicted felon, testified that he and Riley, his nephew, approached Skipper's apartment near the park because they were told that defendant and Skipper were waiting for them. Upon arrival at the apartment, Skipper was standing outside and defendant was in the doorway of the apartment building. Skipper asked the two men what they wanted, and defendant pulled out a shotgun and raised it to the level of Daniels' chest. When they observed the shotgun, Daniels and Riley ran in opposite directions. Defendant briefly chased Daniels but eventually chased Riley towards the park. Daniels continued to run, but heard Skipper yell,

[1] Skipper and defendant had separate, simultaneous trials. Skipper was found not guilty during a bench trial.

"shoot him." Daniels heard and observed the flash of a gunshot and testified that defendant was the shooter. He was standing approximately 15 feet behind defendant, but could not observe the muzzle of the gun or the direction in which defendant pointed the gun. However, Daniels demonstrated that defendant held the shotgun parallel to the ground during the shooting and he observed the flash in the direction that Riley was running. He also testified he was around the corner and could not view Riley during the shooting. Neither he nor Riley carried a gun that night.

¶ 5 On cross-examination, Daniels acknowledged that he could not see Riley or the muzzle of the gun at the time of the shooting but claimed he knew defendant was aiming at Riley. On re-direct, Daniels testified that the muzzle flash was at shoulder level.

¶ 6 Gregory Hollis testified that he was at the park at the time of the shooting. He observed Riley running toward the park and stated, "He got a gun." Riley pushed Hollis behind a motor vehicle when he ran past him. Hollis heard Skipper say, "Ben, shoot," and defendant responded, "F*** this s***." Hollis heard a single gunshot, and subsequently observed Riley on the ground. However, Hollis did not see who shot the gun.

¶ 7 The medical examiner testified that Riley died of a shotgun wound to his face. A lead slug traveled through Riley's face from the right to left, front to back, and upward. The slug's course was consistent with Riley standing chest-to-chest with the shooter with his head turned slightly to the left. However, the medical examiner later acknowledged that he could not say with certainty how the men were standing in relation to each other at the time of the shooting, and there were numerous possibilities of their positioning. There was no evidence that the shotgun was fired at close range.

¶ 8 Defendant testified that he argued with Pierre and threw a bag of Pierre's marijuana to the ground. However, he denied stealing $10 from Pierre. Riley and several other men accused him of stealing Pierre's money and a verbal confrontation ensued, but nothing physical occurred. Shortly thereafter, defendant accompanied Skipper to his apartment near the park.

¶ 9 Later that night, Pierre, the victim, Daniels, and several other men approached Skipper's apartment building. The victim yelled, "[T]ell this b*** a*** to come outside, take his a*** whoopin' like a man." Daniels yelled, "You might as well come out, you might as well come out, take this a*** whoopin' now because you're going to get it later." Skipper went outside to attempt to calm the men down, but first gave defendant a shotgun to "scare them away" by shooting the gun in the air if necessary.

¶ 10 Defendant walked outside with Skipper because the men were calling for him to exit the apartment. Although he did not observe any of the men holding a gun, he knew they often carried guns. As defendant walked toward the sidewalk, Skipper shouted "bus," which defendant understood as a signal to fire the gun in the air. Defendant fired the gun in the air toward the park, which was located a few buildings down the road. None of the men were still in the area when he discharged the gun because everyone ran. He acknowledged that he knew people were in the park when he fired the gun, but denied aiming at anyone or intending to hit anyone. He fired the gun "out of fear and protection." Defendant then dropped the gun and ran to a friend's house. An hour later, defendant learned the victim had been shot. The following day, defendant turned himself in to the police accompanied by his mother.

¶ 11 The State introduced into evidence a certified copy of defendant's prior conviction for aggravated unlawful use of a weapon. In addition to first degree murder, the trial court instructed the jury on involuntary manslaughter. The jury was also given a modified version of Illinois

Patter Jury Instructions, Criminal, No. 26.01I (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 26.01I) (the concluding instruction for a case where the jury is instructed on first degree murder, second degree murder, and involuntary manslaughter) with the second degree murder portion omitted. Defense counsel did not object to the instructions or request instructions on self-defense or second degree murder.

¶ 12 During closing arguments, defense counsel argued that defendant did not want or intend to kill the victim. Rather, the evidence established that, at most, he recklessly fired the shotgun into the park, constituting involuntary manslaughter, not first degree murder.

¶ 13 The jury found defendant guilty of first degree murder, and the trial court subsequently sentenced him to 46 years in IDOC. On direct appeal, defendant argued that instructing the jury with the modified version of IPI Criminal 4th No. 26.01I constituted plain error, that the prosecutor made inaccurate comments during closing arguments, and that trial counsel was ineffective for failing to object to the disputed jury instruction and for failing to file a motion *in limine* to preclude the admission of his prior conviction. This court affirmed his conviction in *People v. Williams*, 391 Ill. App. 3d 257 (2009). This court held that the disputed instruction was erroneously given, and the jury should have been instructed with IPI Criminal 4th No. 26.01Q (the concluding instruction for a case where the jury is instructed on first degree murder and involuntary manslaughter). *Williams*, 391 Ill. App. 3d at 265. However, defendant failed to establish plain error because the evidence was not close and the error did not deprive him of a fair trial. *Williams*, 391 Ill. App. 3d at 265-66. Additionally, this court found that the prosecutor's comments were not improper, (*Williams*, 391 Ill. App. 3d at 269), and defendant failed to demonstrate prejudice from counsel's failure to object to the prior conviction and

erroneous jury instruction in light of the substantial evidence against him (*Williams*, 391 Ill. App. 3d at 271-72).

¶ 14 Defendant, with the assistance of counsel, filed a postconviction petition under the Act, arguing that his trial counsel was ineffective, among other claims. Relevant to this appeal, defendant alleged that counsel failed to argue a self-defense claim after he told counsel that he fired the gun out of fear for his life and failed to interview Lavincent Smith, who would corroborate his self-defense theory and provide *Lynch* evidence (*People v. Lynch*, 104 Ill. 2d 194 (1984)) of the victim's violent temper.

¶ 15 In support of his petition, defendant attached his own affidavit and the affidavits of Lavincent Smith, Skipper, and Skipper's mother, Sandra. Defendant's affidavit averred that he told his attorney to contact Smith because he could attest that "everyone" knew that the victim, Daniels, Pierre, and Hollis were troublemakers and carried guns, but counsel informed him Smith was not helpful because he did not witness the shooting. Defendant told trial counsel that there were no people in the area of the park where he fired the gun. Further, Skipper's mother forced defendant to leave the apartment on the night of the shooting, and he feared for his life. Defendant also provided a supplemental affidavit stating that his attorney hardly met with him prior to trial.

¶ 16 Lavincent Smith's affidavit averred that the victim, Pierre, Daniels, and Hollis are reputed troublemakers in their neighborhood. The men were previously involved in another shooting and were known to hide guns in the park. Defendant told Smith that the men were "messing" with him a few days prior to the victim's death. Defendant's attorney did not contact Smith.

¶ 17 Skipper's affidavit averred that the victim and the other men had reputations as troublemakers and were known to possess guns. Additionally, he observed the victim and Hollis with guns on the night of the shooting, and someone removed the victim's gun before the police arrived. Skipper's mother forced defendant to leave because she did not want any trouble at her house. Finally, Skipper's affidavit averred that he declined to testify at defendant's trial on advice of counsel.

¶ 18 Sandra Skipper's affidavit averred that she told defendant to leave her home the night of the shooting because she worried that her landlord would evict her if there was trouble in her apartment. She refused to testify at defendant's trial because she was frustrated that he caused trouble at her house and did not want to compromise her son's trial by testifying for defendant.

¶ 19 The trial court advanced defendant's petition to the second stage of the postconviction proceedings, and defendant continued with the assistance of his privately retained counsel. The State then moved to dismiss defendant's petition, arguing, in relevant part, that defense counsel provided a vigorous defense, and the evidence at trial, as well as defendant's affidavits, failed to demonstrate he acted in self-defense.

¶ 20 After hearing arguments from the parties, the court granted the State's motion to dismiss defendant's petition. The court concluded that the testimony did not support a theory of self-defense or a finding of second degree murder, so defense counsel was not ineffective for failing to request those instructions or introduce *Lynch* evidence of Riley's alleged violent reputation through Smith. Moreover, the court found that defendant failed to demonstrate prejudice from counsel's failure to request self-defense or second degree murder jury instructions given the substantial evidence against him.

¶ 21 On appeal, defendant claims that the trial court erroneously dismissed his petition because he made a substantial showing that defense counsel was ineffective for failing to request self-defense or second degree murder instructions. Defendant asserts the evidence at trial warranted those instructions, and counsel neglected to contact Lavincent Smith, whose affidavit corroborates a self-defense theory. The State responds that defense counsel's decision not to request self-defense or second degree murder instructions was sound trial strategy. Additionally, the State asserts that the evidence did not support self-defense and/or second degree murder instructions, and, in any event, defendant failed to establish he was prejudiced in light of the overwhelming evidence against him.

¶ 22 The Act provides for a three-stage process by which a defendant may assert his conviction was the result of a substantial denial of his constitutional rights. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008). 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 2010). If the petition is not dismissed within 90 days at the first stage, counsel is appointed and it advances to the second stage. 725 ILCS 5/122-2.1(b) (West 2010).

¶ 23 The instant case involves the second stage of postconviction proceedings. At the second stage, the dismissal of a petition is warranted only when the allegations in the petition, liberally construed in favor of the defendant and in light of the original trial record, fail to make a substantial showing of a constitutional violation. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). At the second stage of postconviction proceedings, the trial court is concerned merely with determining whether the petition's allegations "sufficiently demonstrate a constitutional infirmity that would necessitate relief under the Act." *People v. Coleman*, 183 Ill. 2d 366, 380 (1998). At this stage, "the defendant bears the burden of making a substantial showing of a constitutional

violation" and "all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true." *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). We review *de novo* the trial court's dismissal of defendant's postconviction petition without an evidentiary hearing. *Coleman*, 183 Ill. 2d at 288-89.

¶ 24 To determine whether defendant was denied his right to effective assistance of counsel, we apply the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Defendant must show first, that "counsel's representation fell below an objective standard of reasonableness" *Strickland*, 466 U.S. at 687-88) and, second, that he was prejudiced such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (*Strickland*, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome, namely, that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair." *People v. Enis*, 194 Ill. 2d 361, 376 (2000). To prevail on his claim of ineffective assistance, defendant must satisfy both prongs of the *Strickland* test. *Enis*, 194 Ill. 2d at 377.

¶ 25 Here, defendant essentially argues that, although defense counsel argued an involuntary manslaughter defense based on recklessness, counsel should have additionally argued self-defense and unreasonable belief in self-defense because the evidence supported those theories. However, defendant has not overcome the presumption that the challenged action by defense counsel might be considered sound trial strategy. *Strickland*, 466 U.S. at 689. Even if we were to assume there was sufficient evidence to support a self-defense or second degree murder instruction, defense counsel may have concluded it would be inconsistent with the involuntary manslaughter theory presented because it would require defendant to admit that the shooting was intentional rather than reckless. See *People v. White*, 2011 IL App (1st) 092852, ¶¶ 70-71 (failing

to request self-defense and second degree murder instructions was matter of trial strategy precluding ineffective assistance of counsel claim where counsel argued a theory of defense that would have been inconsistent with those instructions); see also *People v. Gill*, 355 Ill. App. 3d 805, 811 (2005) ("To seek an instruction saying that [the defendant's] resistance was in self-defense would be contrary to her counsel's trial strategy and is not error."); *People v. Wetzel*, 308 Ill. App. 3d 886, 893 (1999) (defense counsel not ineffective for not offering self-defense or second degree murder instructions where counsel made strategic decision to argue involuntary manslaughter at trial). Defendant testified that he did not intend to shoot anyone and instead fired the gun into the air as a warning shot. Based on defendant's own testimony, defense counsel made the strategic decision to argue that, at most, defendant recklessly fired the gun without the requisite intent required for first degree murder. Although defense counsel was ultimately unsuccessful in his trial strategy, that "does not mean [he] performed unreasonably and rendered ineffective assistance." *People v. Walton*, 378 Ill. App. 3d 580, 589 (2007). We therefore conclude that defendant failed to make a substantial showing that counsel's performance was deficient for failing to request self-defense and second degree murder instructions.

¶ 26 Additionally, as we noted on defendant's direct appeal, the overwhelming evidence against him precluded a finding of prejudice under *Strickland*. *Williams*, 391 Ill. App. 3d at 271. The testimony established that although the victim and the other men verbally confronted defendant outside of Skipper's apartment, defendant exited Skipper's apartment and chased the victim to the park with a shotgun. Daniels and Hollis testified that they heard Skipper tell defendant to shoot, and then either heard or observed a gunshot. Defendant testified that he heard Skipper yell "bus," and then fired the gun in the direction of the nearby park. Daniels, however, demonstrated that defendant held the gun parallel to the ground, which, as we pointed out on

direct appeal, belied defendant's claim that he intended to shoot in the air. *Williams*, 391 Ill. App. 3d at 265. Given the nature of the evidence, we find that defendant did not make a substantial showing that the outcome of his trial would be different had counsel requested defendant's desired jury instructions. See *People v. Ward*, 187 Ill. 2d 249, 263 (1999) (no reasonable probability that outcome would have been altered in light of overwhelming evidence); *People v. Gutierrez*, 2011 IL App (1st) 093499, ¶¶ 45-46 (no prejudice shown where evidence of defendant's guilt was overwhelming).

¶ 27 We are likewise unpersuaded by defendant's contention that defense counsel was ineffective for failing to investigate Lavincent Smith after defendant informed him that Smith knew the victim was a reputed bully and carried guns. Defendant contends that Smith's affidavit reveals *Lynch* evidence that would have corroborated his self-defense theory.

¶ 28 Counsel must conduct " 'reasonable investigations or *** make a reasonable decision that makes particular investigations unnecessary,' " which includes "the obligation to independently investigate any possible defenses." *People v. Domagala*, 2013 IL 113688, ¶ 38 (quoting *Strickland*, 466 U.S. at 691). " '[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.' " *People v. Guest*, 166 Ill. 2d 381, 400 (1995) (quoting *Strickland*, 466 U.S. at 691). "Whether the failure to investigate constitutes ineffective assistance of counsel is determined by the value of the evidence not presented at trial and the closeness of the evidence that was presented at trial." *People v. Harmon*, 2013 IL App (2d) 120439, ¶ 26. The *Lynch* rule provides that when self-defense is properly raised, a defendant may present evidence of the victim's violent and aggressive character (1) to show that the defendant's knowledge of that character affected his perception of and reaction to the victim's behavior, or (2) to support

the defendant's version of events where there are conflicting accounts. *People v. Salas*, 2011 IL App (1st) 091880, ¶ 94 (citing *Lynch*, 104 Ill. 2d at 199-200). However, *Lynch* applies only where the evidence supports a theory of self-defense. *Salas*, 2011 IL App (1st) 091880, ¶ 94.

¶ 29 Defendant again fails to make a substantial showing that defense counsel was deficient for failing to investigate what Smith would have testified to. Defendant acknowledges that he informed counsel of Smith's potential testimony and that counsel stated that Smith was not helpful because he did not witness the shooting. As previously discussed, counsel's trial strategy was to argue involuntary manslaughter, and Smith's affidavit does not support that theory. Further, the evidence against defendant was overwhelming, so we are unconvinced that Smith's testimony would have altered the outcome of the trial. *Harmon*, 2013 IL App (2d) 120439, ¶ 26. Defendant, therefore, does not make a substantial showing that counsel was ineffective for failing to further investigate Smith as a viable witness at trial. See *Guest*, 166 Ill. 2d 381 at 400.

¶ 30 Furthermore, the evidence at trial rebutted a claim of self-defense, and thus, precluded *Lynch* evidence. *Salas*, 2011 IL App (1st) 091880, ¶ 94. Daniels and Hollis testified that defendant chased the victim prior to shooting him, which negated self-defense. See *People v. Ellis*, 187 Ill. App. 3d 295, 302 (1989) (self-defense disproved where the defendant chased the fleeing victim prior to beating him to death). Although defendant did not admit to chasing the victim, his testimony established that the victim and the other men ran when defendant walked outside with the shotgun, and therefore presented no imminent threat of harm. *People v. Jackson*, 250 Ill. App. 3d 192, 206 (1995) (self-defense disproved where there was no imminent threat of harm). Thus, Smith's potential testimony would not have been admissible as *Lynch* evidence.

¶ 31 Accordingly, we conclude that defendant has failed to demonstrate a substantial showing that his constitutional right to effective assistance of counsel was violated. *Coleman*, 183 Ill. 2d at 381-82.

¶ 32 For the foregoing reasons, we affirm the order of the circuit court of Cook County.

¶ 33 Affirmed.