2017 IL App (1st) 150134-U

No. 1-15-0134

Order filed March 31, 2017

Fifth Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 04 CR 9052
	)	
NATE DAVIS,	)	Honorable
	)	Evelyn B. Clay,
Defendant-Appellant.	)	Judge, presiding.

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

ORDER

¶ 1 *Held*: We affirm the circuit court's dismissal of defendant's *pro se* postconviction petition, which alleged that his trial counsel was ineffective for failing to investigate and pursue the defense of involuntary intoxication, where the petition failed to make a substantial showing of prejudice.

¶ 2 Defendant Nate (Nathaniel) Davis appeals from an order of the circuit court, which granted the State's motion to dismiss his *pro se* petition for relief under the Post-Conviction

Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2008)).[1] He contends that the court erred in granting the State's motion where his petition made a substantial showing that his trial counsel was ineffective for failing to investigate and pursue the defense of involuntary intoxication. We affirm.

¶ 3 The State charged defendant with the aggravated kidnapping of a one-year-old child (720 ILCS 5/10-2(a)(2) (West 2004)) and possession of a stolen motor vehicle (625 ILCS 5/4-103(a)(1) (West 2004)). Prior to trial, the trial court granted trial counsel's request for a behavioral clinical examination (BCX) of defendant to assess his sanity at the time of the alleged offenses. Dr. Jonathan Kelly, a forensic psychiatrist, submitted a letter to the court, finding defendant legally sane at the time of the alleged offenses. The letter concluded that defendant "did not have a mental disease or defect that caused him to lack substantial capacity to appreciate the criminality of his conduct" when he committed the offenses. The case proceeded to a bench trial.

¶ 4 At trial, the evidence showed that, in the afternoon of March 29, 2004, Aki Williams drove to the 2900 block of West Walnut Street in Chicago in order to collect rent from a woman who lived in a building owned by his grandfather. He exited his vehicle without turning off the engine, leaving his cell phone and one-year-old son inside. Williams walked 25 feet to the woman's front door and rang the doorbell. She answered, and as they were talking, Williams turned around and observed a man, subsequently identified as defendant, enter his vehicle and drive away.

[1] Defendant has been the subject of two prior appeals, one in which he was referred to as "Nathaniel" (*People v. Davis*, 378 Ill. App. 3d 1 (2007)) and another in which he was referred to as "Nate" (*People v. Davis*, No. 1-09-1772 (2011) (unpublished order under Supreme Court Rule 23)).

¶ 5 Defendant drove to the corner of North Sheridan Road and West Windsor Avenue where Tewan Jackson and Jesse Hall observed him in the vehicle. Although they were friends with defendant, neither had seen him in at least a year. Defendant pulled up to them, asked them if they wanted to make some money and told them to come inside his vehicle. Jackson entered the front seat while Hall entered the backseat next to the baby. Defendant told them the baby was his. Jackson and Hall described defendant as dirty, bruised, wearing a ripped and bloody tank top, and shoeless. Defendant appeared to be "really high off something," and his nose and lips were black, as if "he had been smoking something." Defendant explained to them that he had been in a fight with the baby's "baby mama" and had been "jumped" earlier in the day.

¶ 6 Meanwhile, approximately 10 minutes after his vehicle and baby were taken, Williams called his cell phone, which was still inside his vehicle. Defendant answered, stated "money, money, money," and hung up. This happened multiple times before Williams told defendant that he would give him "anything" to have his son returned. Defendant told Williams "ten thousand" and hung up.

¶ 7 Defendant drove the vehicle to his mother's house, exited with the baby, and gave Jackson and Hall the vehicle's keys and the cell phone. Jackson and Hall subsequently learned that the baby was not defendant's after Nina Williams, Aki Williams' wife and the baby's mother, called the cell phone and spoke with Jackson. Jackson and Hall immediately reported what happened to the police. The police drove to the house of defendant's mother, recovered the baby and arrested defendant.

¶ 8 Nancy Evans, defendant's mother, testified in his defense that, after he came to her house that day, he handed her the baby. Evans described defendant as wearing a bloody and ripped

shirt, dirty socks, and pants that were falling down because he did not have a belt. Defendant had knots on his head, was bleeding from his wrists and did not have any shoes. He was crying and "not blinking." Due to defendant's appearance and behavior, and the presence of the baby, which Evans knew did not belong to him, Evans told her daughter to call the police.

¶ 9 The trial court found defendant guilty of aggravated kidnaping and possession of a stolen motor vehicle, and subsequently sentenced him to concurrent terms of 18 years' and 7 years' imprisonment, respectively.

¶ 10 On direct appeal, defendant contended that his ambiguous waiver of his right to testify required the trial court to clarify his waiver and to inquire into his competency to stand trial, and that his mandatory registration under the Sex Offender Registration Act (730 ILCS 150/1 *et seq.* (West 2004)) was unconstitutional. This court rejected these contentions and affirmed defendant's convictions. *People v. Davis*, 378 Ill. App. 3d 1 (2007).

¶ 11 In January 2009, defendant filed a *pro se* petition for relief under the Act (725 ILCS 5/122-1 *et seq*. (West 2008)), alleging that his trial counsel was ineffective for failing to investigate and pursue an insanity defense where he suffered from a "substance-induced psychosis" at the time of the offenses, which rendered him unable "to appreciate the criminality of his conduct." The petition stated that defendant spent approximately one week following his arrest receiving high doses of antipsychotic medication and had to be strapped in full leather restraints. The petition asserted that, despite this condition, counsel did not obtain his medical records and did not review other evidence demonstrating his condition at the time of the offenses. It additionally alleged that counsel merely accepted Dr. Kelly's conclusion that defendant was sane at the time of the offenses without reviewing the actual report and did not

obtain a second opinion on defendant's sanity. The petition concluded that the "numerous bizarre facts" involving defendant should have prompted counsel to investigate his sanity, which a competent attorney would have done, and this failure prejudiced him because an insanity defense "would have had a reasonable probability of success."

¶ 12 In support of these allegations, defendant attached several pieces of evidence to the petition, including medical records, the BCX report from Dr. Kelly, and affidavits from him and Evans. In defendant's affidavit, he averred that, prior to committing the offenses, he was "hanging out with some men in the music business." He "did some drugs with these men, including weed" that he "believe[d] was laced with another substance." Subsequently, the men began to beat defendant and he ran away, ending up at a church. There, someone called the police and an ambulance. The ambulance arrived and transported defendant to a hospital, where a doctor told him "it's a new world order." Defendant became scared again and ran away from the hospital. While running, he observed the men who had beat him, and they began chasing after him again. Defendant continued running until he observed a vehicle with its engine running. He entered the vehicle and drove away, only later realizing there was a baby inside. Because the men were still chasing after him, defendant picked up Jackson and Hall, and drove to his mother's house to try and reach safety.

¶ 13 In Evans' affidavit, she averred that the day before defendant committed the offenses, he "sounded fine." When she awoke the following morning, she had a message on her cell phone from him, wherein he was "crying and speaking incomprehensibly," saying that he had "been killed." She stated that, although she still had the recording, she did not give it to defendant for submission with his petition because it was her only copy and she did "not want to lose it."

Evans averred that she told counsel about the message, but he refused to listen to it. Evans also recounted defendant's disheveled appearance and abnormal behavior upon appearing at her house with the baby. He told her that he "saw Jesus walk the water" and "had seen his deceased grandparents." Evans had "encouraged" counsel to pursue an insanity defense, but he ignored her request.

¶ 14 Medical records showed that, on the day after defendant committed the offenses, he was transferred to Cermak Hospital's psychiatric unit due to his "bizarre" and "manic" behavior. Defendant was immediately placed in full leather restraints after exhibiting "psychotic symptoms," "pressured speech," and "agitation." He reportedly had a "disorganized thought process" and was hearing voices. As a result of his behavior, he was placed in leather restraints for three days and received psychotropic medications. On defendant's fourth day at the hospital, he took a drug test and tested positive for the presence of cannabinoids, but negative for other drugs. By defendant's fifth day in the hospital, he became calm and compliant, although still "possibly delusional." On the seventh day, he declined psychiatric treatment. On the tenth day, he was exhibiting appropriate behavior. A psychiatrist diagnosed defendant with "substance intoxication" and "induced psychosis," but noted that his symptoms had been "resolved." He was subsequently released from the hospital.

¶ 15 The BCX report, authored by Dr. Kelly, included the same details defendant attested to in his affidavit about the events leading up to committing the offenses. According to the report, defendant told Dr. Kelly that he had smoked marijuana multiple times on the day prior to and the day of the offenses. Defendant told Dr. Kelly that he did not have any other drugs or alcohol

those two days. Dr. Kelly diagnosed defendant with a "substance induced psychotic disorder" on the day he committed the offenses, but found him "legally sane" at the time.

¶ 16 The circuit court summarily dismissed defendant's petition as frivolous and patently without merit, finding his claim of ineffective assistance of trial counsel was "essentially *** a re-hashing of his claim on direct appeal" that challenged his competency and was therefore barred by *res judicata*. Moreover, the court found that counsel had defendant examined to assess his sanity at the time of the offenses.

¶ 17 On appeal from the circuit court's summary dismissal, defendant argued that his petition alleged a claim with an arguable basis in law and fact that his trial counsel had been ineffective for failing to raise the defense of involuntary intoxication. *People v. Davis*, No. 1-09-1772 (2011) (unpublished order under Supreme Court Rule 23). This court found that, although defendant's petition focused "heavily" on his counsel's failure to raise an insanity defense, a liberal reading of the petition supported an allegation that counsel was ineffective for failing to raise the defense of involuntary intoxication. *Davis*, No. 1-09-1772. We further found that the claim was "not fantastic or delusional" because the medical records attached to the petition were not in the record on direct appeal and, had counsel reviewed those records, he would have learned that defendant had been diagnosed with a drug-induced psychosis. *Davis*, No. 1-09-1772. Additionally, this court found that defendant's legal theory was not "indisputably meritless" as it was "arguable that an involuntary intoxication defense premised on unwitting ingestion of laced illegal drugs enjoyed a probability of success" at trial. *Davis*, No. 1-09-1772. Although we found the petition's ineffectiveness claim "borderline," it was sufficient under first-stage proceedings to warrant remand back to the circuit court for further proceedings. *Davis*, No. 1-09-1772.

¶ 18 On remand, the circuit court appointed defendant counsel, who filed an Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) certificate, asserting no amendments were necessary to defendant's *pro se* petition to adequately present his claims.

¶ 19 Subsequently, the State filed a motion to dismiss defendant's petition. Relying on *People v. McMillen*, 2011 IL App (1st) 100366, a decision filed after this court's remand order, the State argued that the defense of involuntary intoxication was not available to defendant because he voluntarily ingested an illegal substance, regardless of the effect of that substance. The State therefore concluded that he failed to make a substantial showing that his trial counsel was ineffective.

¶ 20 Defendant responded, arguing that, in *Davis*, No. 1-09-1772 (2011) (unpublished order under Supreme Court Rule 23), this court found the defense of involuntary intoxication was legally possible despite defendant's voluntary ingestion of an illegal substance and therefore *McMillen* did not apply under the law-of-the-case doctrine. Defendant concluded that, because his counsel "ignored a viable defense," his petition must be advanced to an evidentiary hearing.

¶ 21 The State replied, contending that the law-of-the-case doctrine did not apply because the issue in defendant's appeal from the circuit court's summary dismissal was whether his petition made a sufficient showing to survive first-stage proceedings under the Act and not whether involuntary intoxication was actually a viable defense for him. The State also argued the law-of-the-case doctrine was discretionary and that, based on *McMillen*'s holding, the circuit court should exercise its discretion and follow *McMillen*.

¶ 22 The circuit court granted the State's motion to dismiss, finding defendant's petition had failed to make a substantial showing that his trial counsel was ineffective for failing to

investigate and pursue the defense of involuntary intoxication. First, the court found that, because defendant voluntarily ingested marijuana, the defense of involuntary intoxication would have been unavailable to him at trial pursuant to the holding in *McMillen*. Second, it found that defendant's assertion that the marijuana was laced with some other unknown substance was rebutted by the record because the drug test he took following his arrest revealed only the presence of cannabinoids. Lastly, the court found that, because defendant could recall "every detail regarding the incident," his intoxication was not so extreme as to render him incapable of forming the requisite intent to commit the crimes. This appeal followed.

¶ 23 Defendant contends that the circuit court erred in granting the State's motion to dismiss where his petition made a substantial showing that his trial counsel was ineffective for failing to investigate and pursue the defense of involuntary intoxication. He argues that his petition and supporting evidence demonstrated that counsel was aware of defendant's condition yet never requested the medical records from his postarrest hospitalization. According to defendant, had counsel reviewed these documents, counsel would have learned that defendant's crimes were the result of a substance-induced psychosis, therefore necessitating the involuntary intoxication defense. Defendant asserts that these failures prejudiced him because "he would have benefitted from" the defense at trial, resulting in the evidence against him being viewed in a different light, which is therefore sufficient to undermine the confidence of his guilty verdicts.

¶ 24 The Act provides a three-stage process for defendants who allege that they have suffered a substantial deprivation of their constitutional rights. *People v. Cotto*, 2016 IL 119006, ¶ 26. Defendant's petition was dismissed at the second stage. At this stage, his postconviction petition and accompanying documentation must make a substantial showing of a violation of his

constitutional rights to receive an evidentiary hearing. *People v. Domagala*, 2013 IL 113688, ¶¶ 33-34. A substantial showing is a measure of the legal sufficiency of the petition's allegations, which, if proven at an evidentiary hearing, would entitle defendant to relief. *Domagala*, 2013 IL 113688, ¶ 35. All well-pled facts that are not positively rebutted by the trial record must be accepted as true. *Domagala*, 2013 IL 113688, ¶ 35 (citing *People v. Coleman*, 183 Ill. 2d 366, 385 (1998)). We review the circuit court's decision to dismiss a petition without an evidentiary hearing *de novo*. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006).

¶ 25 To establish that trial counsel was ineffective, defendant must satisfy the standard articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). *Domagala*, 2013 IL 113688, ¶ 36. Under this standard, he must show that his counsel's performance was deficient and the deficiency prejudiced him. *Domagala*, 2013 IL 113688, ¶ 36. More specifically, defendant needs to show that his counsel's performance was "objectively unreasonable" and that "a 'reasonable probability' " existed that, but for counsel's performance, the result of his trial would have been different. *Domagala*, 2013 IL 113688, ¶ 36 (quoting *Strickland*, 466 U.S. at 694). Both elements of the *Strickland* test must be met, and we may analyze them in any order. *People v. Kirklin*, 2015 IL App (1st) 131420, ¶ 109. We address the prejudice element first.

¶ 26 Under section 6-3 of the Criminal Code of 1961 (720 ILCS 5/6-3 (West 2004)), "[a] person who is in an intoxicated or drugged condition is criminally responsible for conduct unless such condition is involuntarily produced and deprives him of substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." Involuntary intoxication is an affirmative defense, which, if believed by the trier of fact, exculpates the defendant from the charged offenses. *People v. Hari*, 218 Ill. 2d 275, 295 (2006).

Our supreme court has defined " 'involuntary' as 'springing from accident or impulse rather than conscious exercise of the will' " and " '[n]ot resulting from a free and unrestrained choice; not subject to control by the will.' " *Id.* at 292-93 (quoting Webster's Third New International Dictionary 1191 (1993) and Black's Law Dictionary 833 (7th ed. 1999)).

¶ 27 Instructive is *People v. McMillen*, 2011 IL App (1st) 100366, ¶ 10, a case in which a defendant filed a postconviction petition, alleging that, at the time he committed a murder, he was experiencing "unwarned and unexpected adverse side effects of [knowing usage of] prescription medication and cocaine." The circuit court dismissed the petition, finding it meritless. *McMillen*, 2011 IL App (1st) 100366, ¶ 10. On appeal, this court addressed whether the defendant could raise the defense of involuntary intoxication under such circumstances. *McMillen*, 2011 IL App (1st) 100366, ¶¶ 15, 18-19.

¶ 28 We noted that "Illinois case law supports a conclusion that the knowing, or voluntary, ingestion of cocaine or other illegal drugs precludes the use of the involuntary intoxication defense." *McMillen*, 2011 IL App (1st) 100366, ¶ 22 (citing cases). We stated that any potential consequences resulting from such knowing cocaine and prescription medication usage "may not be considered *unknown* and, in fact, are so obvious that a warning need not be made by a physician." (Emphasis in original.) *McMillen*, 2011 IL App (1st) 100366, ¶ 28. This court further noted that "[e]xcessive cocaine use alone is commonly known to produce adverse side effects" and therefore it was "common knowledge that adverse side effects may result" when ingesting cocaine and prescription medication. *McMillen*, 2011 IL App (1st) 100366, ¶ 28. Given that the defendant had voluntarily ingested cocaine, we held that his petition was based on an "indisputably meritless legal theory" as "Illinois law does not allow the involuntary intoxication

defense where an individual voluntarily ingested an illegal drug." *McMillen*, 2011 IL App (1st) 100366, ¶ 29. We accordingly affirmed the circuit court's dismissal. *McMillen*, 2011 IL App (1st) 100366, ¶ 29.

¶ 29 Turning to the present case, defendant argues that the defense of involuntary intoxication was available to him based on his ingestion of marijuana, which he believed was laced with another substance. However, defendant knowingly ingested the marijuana prior to committing the offenses on March 29, 2004, a fact he concedes on appeal. In 2004, marijuana possession and usage were unlawful. See 720 ILCS 550/4 (West 2004) ("It is unlawful for any person knowingly to possess cannabis."). As "Illinois law does not allow the involuntary intoxication defense where an individual voluntarily ingested an illegal drug" (*McMillen*, 2011 IL App (1st) 100366, ¶ 29), the defense of involuntary intoxication would have been unavailable to defendant at trial because he voluntarily ingested marijuana. The fact that the marijuana might have been laced with something else, causing defendant's substance-induced psychosis, is immaterial to whether the defense would have been available to him. See *United States v. Bindley*, 157 F.3d 1235, 1243 (10th Cir. 1998) (finding an involuntary intoxication defense unavailable to a defendant who voluntarily smoked a marijuana cigarette that he subsequently believed was laced with another drug because he "had no right to assume smoking the marijuana cigarette would produce a predictable effect" and not possibly be "laced with an adulterant," and therefore, "by voluntarily choosing to smoke the marijuana cigarette, any resulting intoxication (whatever that may have been) was likewise voluntary").[2]

[2] Although we acknowledge that federal court decisions are not binding on this court, such decisions may serve as persuasive authority. *People v. Rendak*, 2011 IL App (1st) 082093, ¶ 18.

¶ 30 Defendant, however, argues that *McMillen*'s holding is inapplicable to his situation. He posits that, while he knowingly ingested the marijuana, he unknowingly ingested the illegal substance with which the marijuana was laced, whereas in *McMillen*, this court only addressed "the *knowing* usage of illegal drugs." We disagree and find that *McMillen* sufficiently addresses defendant's situation. It is uncontroverted that defendant voluntarily ingested marijuana, an illegal substance, and *McMillen* held in no uncertain terms that the defense of involuntary intoxication was unavailable to someone who voluntarily ingested an illegal substance. *McMillen*, 2011 IL App (1st) 100366, ¶ 29. The fact that the marijuana defendant ingested may have reacted with an unknown substance and produced adverse side effects is immaterial. That is the risk defendant took when he voluntarily ingested an illegal substance. See *Bindley*, 157 F.3d at 1243.

¶ 31 Furthermore, defendant merely speculates that the marijuana he smoked prior to committing the offenses was laced with some other unknown substance that caused his involuntary intoxication. But, marijuana is not the only substance defendant admitted to using that day. In his affidavit, he admitted that he "did some drugs *** including weed." It is entirely conceivable that these other illegal "drugs" he knowingly consumed, either in isolation or in combination with the marijuana, caused his intoxication, further preventing him from raising the defense of involuntary intoxication. See *McMillen*, 2011 IL App (1st) 100366, ¶ 29.

¶ 32 Defendant acknowledges decisions from other jurisdictions (see *Bindley*, 157 F.3d 1235; *United States v. F.D.L.*, 836 F.2d 1113 (8th Cir. 1988); *People v. Velez*, 221 Cal. Rptr. 631 (Cal. Ct. App. 1985); *State v. McClenton*, 781 N.W.2d 181 (Minn. Ct. App. 2010); *State v. Sette*, 611 A.2d 1129 (N.J. Super. Ct. App. Div. 1992)), where courts have found that a defendant's

knowing ingestion of marijuana laced with an unknown substance, such as PCP, precluded the defense of involuntary intoxication. Defendant argues that these decisions are unpersuasive because the "legal status of marijuana is currently in flux in Illinois" and other states have completely legalized marijuana or legalized it for medicinal purposes. Although, as defendant notes, laws regarding marijuana possession and usage have been evolving throughout the country, in 2004, when defendant committed the offenses, the law in Illinois regarding marijuana possession and usage was settled: It was unlawful. See 720 ILCS 550/4 (West 2004). While the decisions defendant highlights are not binding on this court (see *In re A.C.*, 2016 IL App (1st) 153047, ¶ 47), we find them persuasive, reinforcing the holding of *McMillen* and our reliance on *McMillen* in this case.

¶ 33 Given the defense of involuntary intoxication would have been unavailable to defendant at trial, his petition has not made a substantial showing that he was prejudiced by trial counsel's alleged failure to investigate and pursue the defense. See *People v. Weir*, 111 Ill. 2d 334, 340-41 (1986) (finding the defendant was not prejudiced by his trial counsel's failure to raise a voluntary intoxication defense where "there was not a reasonable probability that the defense of intoxication would have succeeded").

¶ 34 Defendant additionally argues he was prejudiced because, even if he could not fully establish the defense at trial, the facts surrounding his intoxication would have provided significant mitigating evidence at his sentencing hearing. Defendant highlights section 5-5-3.1(a)(4) of the Unified Code of Corrections (730 ILCS 5/5-5-3.1(a)(4) (West 2004)), which states where "[t]here were substantial grounds tending to excuse or justify the defendant's

criminal conduct, though failing to establish a defense," these circumstances should weigh in favor of a less severe sentence.

¶ 35 However, this claim was not included in defendant's postconviction petition, which focused almost exclusively on his trial counsel's failure to raise the defense at his actual trial. There is a reference in the petition to the fact that defendant's medical records were not obtained by trial counsel "for use at trial or sentencing." Nevertheless, the petition never alleged anything further concerning sentencing, never once alleged that this evidence would qualify as statutory mitigating evidence and never made an argument as to how defendant's sentence was prejudiced by counsel's alleged errors. Consequently, defendant has forfeited raising this issue on appeal. See 725 ILCS 5/122-3 (West 2008); *Pendleton*, 223 Ill. 2d at 475 (finding a defendant's argument on appeal "forfeited because [he] did not raise the issue in either his *pro se* petition or an amended petition").

¶ 36 In sum, defendant's petition has not made a substantial showing that he was prejudiced as a result of his trial counsel's alleged failure to investigate and pursue the defense of involuntary intoxication. Because the petition cannot make a substantial showing of prejudice, its claim of ineffective assistance of counsel must fail. See *Kirklin*, 2015 IL App (1st) 131420, ¶ 109. Accordingly, the circuit court properly granted the State's motion to dismiss defendant's postconviction petition.

¶ 37 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 38 Affirmed.