2017 IL App (1st) 150629-U

No. 1-15-0629

October 31, 2017

Second 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. 04 CR 14422
	)	
SEAN ROSE,	)	Honorable
	)	Anna Helen Demacopoulos,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE NEVILLE delivered the judgment of the court.
Justices Hyman and Mason concurred in the judgment.

ORDER

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

¶ 2 Sean Rose, the defendant, 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

inform the trial court that defendant had not received two of his three prescribed psychotropic medications prior to trial and investigate how the lack of medication affected defendant's fitness for trial. We affirm.

¶ 3 Following a jury trial, defendant was convicted of second degree murder (720 ILCS 5/9-2 (West 2004)) and attempted first degree murder (720 ILCS 5/8-4(a); 720 ILCS 5/9-1 (West 2004)) and sentenced to two consecutive terms of 20 years and 25 years' imprisonment. We set forth the facts of the case in our order deciding defendant's direct appeal (*People v. Rose*, No. 1-06-2388 (2008) (unpublished order under Supreme Court Rule 23)), and we recount them here to the extent necessary to resolve defendant's current appeal.

¶ 4 Prior to trial, defense counsel sought a behavioral clinical examination (BCX) to determine defendant's sanity and fitness for trial. During a fitness hearing, the parties stipulated that, if called, Dr. Nishad Nadkami, an expert in the field of forensic psychiatry, would testify to the following. He was a staff psychiatrist for Forensic Clinical Services and worked for the circuit court of Cook County. After evaluating defendant, Dr. Nadkami's opinion, to a reasonable degree of medical and psychiatric certainty, was that defendant was fit to stand trial with medications. Defendant understood the nature of the proceedings, knew the roles of the various court personnel, and was able to assist in his defense if he so chose. Defendant was prescribed Prozac, an antidepressant; Valproic Acid, a mood stabilizer; and Sinequan, a sedating anti-depressant for nighttime. Defendant denied experiencing side effects with his medication. Defendant needed to continue his medication to maintain his fitness status.

¶ 5 Based on the stipulation, the court found defendant was fit to stand trial with medication. The day after jury selection, but prior to opening statements, the following colloquy ensued.

"[STATE]: Judge, there is one thing before we start. One is that there was a stipulated fitness hearing, the defendant was found fit to stand trial with medications. We just ask at this time, before we we [*sic*] start this trial, make an inquiry of the defense, as well as the defendant, that he is taking his medication, he is feeling no side effects and he understands what's going on, pursuant to the finding.

[THE COURT]: Counsel.

[DEFENSE COUNSEL]: I spoke to [defendant] about that very subject on Friday of last week and he indicated he was doing well, Judge.

[THE COURT]: Okay. And he is currently taking his medication that has been proscribed [*sic*], is that correct?

[DEFENDANT]: Yes."

¶ 6 The evidence at trial established that on May 10, 2004, defendant, Antoine Burnette, and Prentis Rogers drank beer and smoked marijuana while driving in Burnette's car. The three men eventually parked in the parking lot outside Burnette's townhouse.

¶ 7 Rogers testified that the three men discussed who would drive him home. Defendant, who was sitting in the back seat, shot Burnette in the back of the head. Rogers attempted to flee through the rear driver's side door, and defendant, who was standing outside the car, shot Rogers in his left shoulder.

¶ 8 Christopher Nalls testified that as he was driving in the townhouse parking lot, he observed three men in Burnette's car. After parking, Nalls walked past the car and heard raised voices followed by a gunshot. He observed movement in the car and heard a second shot. Nalls

then observed the rear passenger side door open. An unidentified man exited the vehicle and ran toward another car. The man then returned to the first vehicle and fired additional shots.

¶ 9 Defendant testified that he planned to hang out with Burnette and Rogers that night. He knew Burnette carried a handgun, and he also carried one for protection. Defendant had no reason to fear either Burnette or Rogers, and he did not see either of them in possession of a gun that night. Defendant sat in the rear passenger seat of Burnette's car, Rogers was in the front passenger seat, and Burnette was driving. The men argued in the townhouse parking lot about driving Rogers home. Burnette said he did not have enough gas to drive Rogers home, and defendant responded jokingly that Burnette could get gas money from the safe that he had stolen from defendant several months earlier. Burnette turned to defendant and cursed at him for bringing up the subject of the safe. Both Rogers and Burnette started fighting with defendant. In response, defendant struck Burnette near his left ear, which caused him to lean forward. Defendant thought Burnette was reaching for something between his legs or under his seat where he kept his gun. Fearing for his safety, defendant shot Burnette near his head. Rogers grabbed and jerked defendant's forearm, causing the gun to fire again.

¶ 10 Defendant exited the vehicle and shot a third time at Rogers, who appeared to be looking in the area where Burnette had reached. Defendant ran to his car, but realized his keys were in Burnette's car so he returned to Burnette's car to retrieve his keys. He observed Rogers moving, so he fired a warning shot without intending to kill Rogers. Defendant attempted to shoot the gun away from the car. Rogers stopped moving, but continued to scream and plead for his life. Defendant then found his keys, returned to his own vehicle, and fled the scene. The police recovered the gun from defendant's vehicle.

¶ 11 The jury found defendant guilty of second degree murder of Burnette and attempted first degree murder of Rogers. At defendant's sentencing hearing, the State again mentioned defendant's BCX and competency to proceed to sentencing. Defense counsel stated, "There is no issue as to his competency regarding sentencing." In allocution, defendant apologized for what happened on May 10, 2004, and stated that he had to make a split-second decision during a dangerous situation.

¶ 12 The trial court subsequently sentenced defendant to consecutive sentences of 20 years' and 25 years' imprisonment. On direct appeal, defendant argued, *inter alia*, that the trial court failed to make an independent determination of his fitness to stand trial. *Rose*, No. 1-06-2388 at *1. This court affirmed his conviction in *People v. Rose*, No. 1-06-2388 (2008) (unpublished order under Supreme Court Rule 23). This court held that the trial court did not err by accepting the parties' stipulation regarding defendant's fitness, and, in any event, there was no finding of a *bona fide* doubt of defendant's fitness so an independent fitness determination was not warranted. *Id.* at *6-7. Further, this court pointed out that defendant did not at any time claim he was unfit. *Id.* at *7. The Illinois Supreme Court subsequently denied defendant's petition for leave to appeal. *People v. Rose*, 232 Ill. 2d 592 (2009).

¶ 13 On February 23, 2010, defendant filed a *pro se* 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 (1) "request a fitness evaluation when [he] learned from [defendant] that he was only receiving part of his prescribed medications during trial;" and (2) "adequately investigate [defendant's] mental health history" and "ascertain [defendant's] sanity at the time of the offense."

¶ 14 In support of his petition, defendant attached his own affidavit, which stated that, prior to trial, he told counsel that he took his medication "when they would give it to [him]" but was not receiving two of his three medications on the days he attended trial. He asserted that, on trial days, he was returned to his cellblock too late to receive his evening medication. Defendant further averred that he told counsel he could not understand everything that was happening at his trial and was drowsy and suffering "flashes back and forth" as a result of irregular administration of his medication. Defendant stated that "things only got worse[] at sentencing," he "couldn't think to respond," and he could "only say [he] didn't understand."

¶ 15 The trial court advanced defendant's petition for further proceedings under the Act, and appointed the public defender's office to represent him. The State moved to dismiss defendant's petition, arguing, in relevant part, that defendant failed to show counsel was deficient where a BCX was performed, the record showed defendant affirmatively told the trial court he was taking his medication, and the record showed there was no *bona fide* doubt of his fitness.

¶ 16 After hearing arguments from the parties, the court granted the State's motion to dismiss defendant's petition. In relevant part, the court concluded that defendant's claim regarding his attorney's alleged deficient performance concerning his fitness to stand trial was unsupported and belied by the record. The court noted defendant's affirmative response when the trial court asked him whether he was taking his prescribed medication. Further, the court stated that nothing in the record indicated that "[d]efendant did not understand the nature of the charges against him, that he was unable to cooperate with counsel during his presentation of his case, that he did not understand the nature of the roles of any of the other individuals in the courtroom." Thus, the

court concluded that there was no *bona fide* doubt as to defendant's fitness at trial. This appeal followed.

¶ 17 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 inform the trial court that he had not received some of his medications during trial and investigate how the lack of medication affected defendant's fitness.

¶ 18 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(a), (b) (West 2010).

¶ 19 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 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 circuit court's dismissal of defendant's postconviction petition without an evidentiary hearing. *Id.*

¶ 20 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). *People v. Enis*, 194 Ill. 2d 361, 376 (2000). 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" (*Id.* 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." *Enis*, 194 Ill. 2d at 376. To prevail on his claim of ineffective assistance, defendant must satisfy both prongs of the *Strickland* test. *Id.* at 377.

¶ 21 The prosecution of a defendant who is not fit to stand trial violates due process. *People v. Haynes*, 174 Ill. 2d 204, 226 (1996). A defendant is presumed to be fit to stand trial and will be considered unfit only if, because of the defendant's mental or physical condition, the defendant is unable to understand the nature and purpose of the proceedings against him or her or to assist in his or her defense. 725 ILCS 5/104-10 (West 2006).

¶ 22 To establish that counsel's alleged deficient performance prejudiced defendant, he must show that facts existed at the time of his trial that would have raised a *bona fide* doubt of his ability to understand the nature and purpose of the proceedings and assist in his defense. *People v. Alberts*, 383 Ill. App. 3d 374, 378 (2008). Where, as here, defendant's postconviction petition was dismissed without an evidentiary hearing, "[t]he critical inquiry is whether the facts

presented in defendant's post-conviction petition raised a *bona fide* doubt of his fitness to stand trial." *People v. Johnson,* 183 Ill. 2d 176, 193 (1998).

¶ 23 Here, we find defendant cannot establish the prejudice prong of *Strickland*. See *People v. Lacy,* 407 Ill. App. 3d 442, 457 (2011) (noting that if we can dispose of defendant's ineffective assistance claim because he suffered no prejudice, we need not address whether his counsel's performance was objectively reasonable). According to Dr. Nadkami, defendant was fit to stand trial provided he take his prescribed medication, and he expressly concluded defendant understood the nature of the proceedings and the roles of the various courtroom participants. The trial court, at the State's request, directly asked defendant if he was taking his medication, and defendant responded affirmatively. While defendant contends that he told his attorney that he was not receiving all of his medication *after* the trial court inquired about his medication, we find the record rebuts this contention. Defendant asserts that he did not receive his nighttime medication because, on the days he was in court, he returned to the jail after 9 p.m. and the nurse was no longer working at that time. However, the trial court inquired about defendant's medication just before opening statements on the second day of trial. The day prior, defendant had been in court for jury selection. Yet, despite allegedly not having received his medication the night before, defendant, when asked directly, failed to inform the court that he did not receive his medication the night before.

¶ 24 Moreover, the record establishes defendant's understanding of the proceedings and his ability to participate. See *Johnson*, 183 Ill. 2d at 193-94. Defendant testified at trial, and there is no indication from the record that he was unable to comprehend the proceedings or what was asked of him. On the contrary, defendant coherently answered all questions asked, and at times

even corrected the prosecutor to clarify his testimony. Furthermore, at his sentencing hearing, defendant gave a statement in allocution, wherein he apologized for the crime and clearly explained that he was in a dangerous situation where he felt he was forced to make a split-second decision. See *People v. Shum*, 207 Ill. 2d 47, 59 (2003) (the defendant's clear speech during allocution demonstrated his ability to understand the proceedings and participate in his defense). At no time did defendant complain of counsel's performance, his alleged lack of medication, or his inability to understand the various stages of his trial and sentencing, despite being afforded several opportunities to do so.

¶ 25 Additionally, we point out again that defendant does not maintain he was unfit. He merely concludes that counsel should have investigated his fitness and reported his alleged lack of medication to the trial court, and even claims that an evidentiary hearing is warranted to determine *if* counsel's performance was deficient. This is not the proper standard for a second stage postconviction proceeding (see *Pendleton*, 223 Ill. 2d at 473 (the defendant must make a substantial showing of a constitutional violation)), and we are unpersuaded by defendant's contention, in light of his clear and concise testimony and statement in allocution. We find that the record does not contain facts which raised a *bona fide* doubt of defendant's fitness to stand trial, and defendant, therefore, cannot make a substantial showing that he suffered prejudice as a result of counsel's performance.

¶ 26 Based on the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 27 Affirmed.