2017 IL App (3d) 140895-U

Order filed June 28, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 13th Judicial Circuit,
	)	La Salle County, Illinois.
Plaintiff-Appellee,	)	
	)	Appeal No. 3-14-0895
v.	)	Circuit No. 06-CF-575
	)	
JAMES ALVARADO,	)	
	)	Honorable H. Chris Ryan,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Lytton and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err in summarily dismissing defendant's *pro se* postconviction petition.

¶ 2 Defendant, James Alvarado, appeals the summary dismissal of his postconviction petition, arguing that his petition alleged the gist of a claim of ineffective assistance of appellate counsel. We affirm.

¶ 3 FACTS

¶ 4 A jury found defendant guilty of the first degree murder of his wife, Angela Alvarado. (720 ILCS 5/9-1(a)(1) (West 2006)). On appeal, this court reversed defendant's conviction and remanded for a new trial. *People v. Alvarado*, 3-08-0200 (2010) (unpublished order under Supreme Court Rule 23).

¶ 5 Prior to retrial, defendant filed a motion *in limine* requesting the dismissal of any prospective juror that referred to defendant's prior trial. The court agreed to probe the venire members' knowledge of the case.

¶ 6 During *voir dire*, several individuals indicated that they had read news reports covering defendant's case and had an opinion on his guilt. Several jurors were excused for cause and others were individually questioned outside the presence of the venire. For clarity, we only discuss those potential jurors that are relevant to this appeal.

¶ 7 During individual questioning, potential juror Dolores Thompson stated that she had read that defendant had shot his wife and was being retried because of the admission of improper evidence. Thompson then stated that she believed defendant was guilty, but she thought she could change her mind.

¶ 8 Potential juror Kathy Talty indicated that she had read an article that indicated that defendant's wife had been shot, but could not recall anything further. Talty then stated that she had a preconceived notion of the brutality of the case.

¶ 9 The defense moved to excuse Thompson and Talty for cause, but the court denied the request. The defense then used two peremptory challenges to excuse Talty and Thompson.

¶ 10 During further individual questioning, potential juror Joseph Vezain told the court that he had read that defendant was being retried because the court had not let in hearsay evidence at the first trial. Vezain, however, said he had no opinion as to defendant's guilt and that this

information would not influence his opinion. Potential juror Tom Grady also read about defendant's previous murder conviction, but had no opinion as to defendant's guilt and agreed to decide the case based on the evidence presented at trial. The defense moved to excuse Vezain and Grady for cause, which the court denied. Defendant did not use any peremptory challenges on Vezain or Grady and both were ultimately empanelled.

¶ 11 In the final venire panel, prospective jurors Yvonne Meyers, Pearl Schutt, and Cynthia Stielow, all said they had read about defendant's case. Both Schutt and Stielow stated that they had no opinion as to defendant's guilt. Meyers, though, had an opinion as to defendant's guilt. These prospective jurors were not individually questioned or admonished that they should disregard any information they had previously learned from reading about the case. However, Stielow and Schutt both stated that they understood that defendant was presumed innocent, that he was not required to offer any evidence on his own behalf, that he must be proved guilty beyond a reasonable doubt, and that his failure to testify on his own behalf cannot be held against him. Stielow and Schutt also agreed that they would not favor one side of the case, and would listen to the evidence and arguments presented during trial when reaching their decision.

¶ 12 While the court was admonishing this panel as to the essential qualifications of jurors in a criminal case, Meyers interrupted, asking, "Has this defendant been under trial before, hasn't he? No." The court then interjected by telling Meyers, "We are talking about the propositions." Out of the venire's presence, the defense expressed concern that this panel had been "soiled" because of Meyers' statement. The court struck Meyers for cause, but did not dismiss the remaining panel members. The defense did not otherwise move to strike Schutt and Stielow for cause. The defense also did not ask the court to further question Schutt and Stielow regarding their knowledge of the case. Instead, the defense told the court that it had exhausted its peremptory

challenges and accepted Schutt and Stielow as jurors. The defense did not request additional peremptory challenges.

¶ 13 The cause then proceeded to trial. The facts presented at the trial are explained in detail in this court's prior order, and we recount only those facts necessary to the instant appeal. See *People v. Alvarado*, 2013 IL App (3d) 120467, ¶¶ 3-7. Relevant to this appeal are the instructions given to the jury prior to deliberations.

¶ 14 During the jury instruction conference, the defense requested an instruction on the lesser-included offense of first degree murder, involuntary manslaughter. The State did not object, and the court instructed the jury on this defense, including the instruction defining recklessness. Illinois Pattern Jury Instructions, Criminal, No. 5.01 (4th ed. 2000) (hereinafter, IPI Criminal 4th).

¶ 15 As to the instructions for the offense of first degree murder, the court agreed to provide the jury with the instruction that defendant must have performed the acts that cause his wife's death. The court also agreed to instruct the jury that when defendant performed such acts, "he intended to kill or do great bodily harm to Angela Alvarado, or he knew that such acts would cause the death of Angela Alvarado, or he knew that such acts create a strong probability of death or great bodily harm to Angela Alvarado." The defense asked the court to instruct the jury with the jury instructions defining intent and knowledge. IPI Criminal 4th Nos. 5.01A, 5.01B. The State objected on the basis that the committee notes to those instructions took no position on whether their definitions should be routinely given absent a specific request from the jury, as both words have plain meaning within a juror's common understanding. The court agreed with the State, and refused to instruct the jury as to either definition.

¶ 16 During deliberations, the jury asked to review the transcript of the 911 call defendant made on the night of the murder, as well as the video recording of defendant's interview with the police. The court allowed the jury to review the interrogation, but did not allow the jury to review the 911 call transcripts. The jury did not request a definition of intent or knowledge.

¶ 17 After deliberating, the jury found defendant guilty of first degree murder. The court sentenced defendant to 45 years' imprisonment.

¶ 18 Defendant appealed, raising several issues (evidentiary rulings, allowing the jury to rewatch his interrogation during deliberations, and sentencing credit). However, appellate counsel did not argue that defendant was deprived of his right to an impartial jury when the court refused to strike several venire members for cause. In addition, defendant did not raise the claim that the court erred when it refused to instruct the jury as to the definitions of intent and knowledge. This court affirmed. See *Alvarado*, 2013 IL App (3d) 120467.

¶ 19 Subsequently, defendant filed a *pro se* postconviction petition, which is the subject of this appeal. Although defendant raised several claims in his *pro se* petition, relevant to this appeal are defendant's allegations that he received ineffective assistance of appellate counsel. Specifically, defendant alleged that appellate counsel provided ineffective assistance in failing to raise the claim that he was denied his right to an impartial jury and that the court erred in refusing to instruct the jury as to the definitions of intent and knowledge.

¶ 20 The court summarily dismissed the petition at first-stage proceedings, finding the petition frivolous and patently without merit.

¶ 21 ANALYSIS

¶ 22 On appeal, defendant argues the court erred in dismissing his postconviction petition at the first stage of proceedings because it presented the gist of a claim that he received ineffective

assistance of appellate counsel. Defendant contends that his petition sufficiently alleged that he received ineffective assistance for appellate counsel's failure to raise the claim that (1) defendant was denied his right to an impartial jury based on the court's refusal to strike certain prospective jurors during *voir dire* and (2) the court erred when it denied the defense's request to instruct the jury on the definitions of intent and knowledge.

¶ 23 Upon review, we find that defendant suffered no prejudice from the court's *voir dire* rulings because defendant excused the jurors in question with his peremptory challenges. We also find that the court had no duty to instruct the jury on the definitions of the commonly understood terms intent and knowledge. Therefore, we hold that defendant failed to allege a gist of a constitutional claim in his *pro se* postconviction petition.

¶ 24 At the first stage of postconviction proceedings, a defendant need only allege a "gist" of a claim, *i.e.*, enough facts to assert an arguable violation of his constitutional rights. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). "A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation." *Id*. at 16. The "gist" standard is a low threshold that does not require a petitioner to set forth the constitutional claim in its entirety but, instead, requires only a limited amount of detail. *People v. Scott*, 2011 IL App (1st) 100122, ¶ 24. This court reviews *de novo* a first-stage dismissal of a postconviction petition. *People v. Dorsey*, 404 Ill. App. 3d 829, 833 (2010).

¶ 25 Allegations of ineffective assistance of appellate counsel are resolved under the same standard that governs the performance of trial counsel. *People v. West*, 187 Ill. 2d 418, 435 (1999). That is, we look to *Strickland v. Washington*, 466 U.S. 668 (1984), when considering a claim of ineffective assistance of appellate counsel. Under *Strickland*, a defendant must show that counsel's performance both "fell below an objective standard of reasonableness" and the

deficient performance prejudiced the defense. *Id*. at 688. "[A] petition alleging ineffective assistance 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." *Hodges*, 234 Ill. 2d at 17.

¶ 26 I. *Voir Dire*

¶ 27 Defendant contends that appellate counsel's performance fell below an objective standard of reasonableness where counsel failed to challenge the court's refusal to strike several venire persons who indicated knowing that defendant had been previously tried and convicted of his wife's murder. If an ineffective assistance claim can be disposed because defendant suffered no prejudice, we need not determine whether counsel performed deficiently. *People v. Graham*, 206 Ill. 2d 465, 476 (2003).

¶ 28 A criminal defendant's right to an impartial jury is guaranteed by both the United States and the Illinois Constitutions. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8; *People v. Metcalfe*, 326 Ill. App. 3d 1008, 1014 (2001). An impartial jury is one in which the jury is "capable and willing to decide the case solely on the evidence before it." *Smith v. Phillips*, 455 U.S. 209, 217 (1982). A jury's verdict must be based solely on the evidence heard during trial and not information obtained elsewhere. *People v. Taylor*, 101 Ill. 2d 377, 386 (1984). If a defendant is denied his right to a fair trial because of the denial of a challenge for cause to a juror, the defendant must receive a new trial. *Id*. at 387. When determining whether a defendant received a fair trial from an impartial jury, "there is no simple test which we can apply to every case." *Id*. at 391. Instead, we must base our decision on the totality of the circumstances. *Id*.

¶ 29 Defendant contends that the jurors' knowledge of defendant's prior trial casts doubt on their ability to be impartial. Specifically, defendant calls our attention to the fact that several

jurors had knowledge of the case (Vezain, Grady, Stielow, and Schutt) including some that knew defendant's conviction had been reversed due to an evidentiary error in the first trial (Vezain and Grady). Relying on several out of jurisdiction cases, defendant contends that this knowledge warrants automatic dismissal of the jurors for cause. See *Hughes v. Delaware*, 490 A.2d 1034 (Del. 1985); *United States v. Williams*, 568 F.2d 464 (5th Cir. 1978). This is not the law in Illinois. See *People v. Britz*, 185 Ill. App. 3d 191, 200 (1989).

¶ 30 Illinois law provides that the right to an impartial jury does not require that jurors be completely ignorant of the case before trial. *People v. Coleman*, 168 Ill. 2d 509, 547 (1995). Heinous crimes are reported extensively in the media, and it would be unreasonable to expect jurors not to have at least heard of those cases prior to trial. *Taylor*, 101 Ill. 2d at 386. An impartial jury can be secured under such circumstances if the jurors are willing and able to put aside their preconceptions and decide the case based upon the evidence presented at trial. *Coleman*, 168 Ill. 2d at 547. In other words, "knowledge of the case will not itself disqualify one for jury service." *Britz*, 185 Ill. App. 3d at 200.

¶ 31 At the outset, we note that two of the potential jurors (Thompson and Talty) defendant argues the court erred in refusing to strike for cause did not actually sit on the jury. Defendant, therefore, cannot establish prejudice with regard to these two jurors. Of the jurors that actually sat on the jury, four (Vezain, Grady, Stielow, and Schutt) had knowledge of defendant's case. Unlike Thompson and Talty, though, all four jurors specifically stated that they had not formulated an opinion as to defendant's guilt. Jurors Vezain and Grady both indicated that they knew defendant was being retried because of an evidentiary error in the first trial, but told the court that they would base their verdict on what occurred in court. In addition, they agreed that any information they had of the previous trial would not influence their decision in this trial.

Similarly, both Stielow and Schutt indicated that they had read about defendant's case, but had not formed an opinion as to defendant's guilt. Although neither Stielow nor Schutt were individually questioned as to their knowledge of the case or specifically admonished to disregard outside news reports, both agreed that they would consider the evidence presented at trial in making their determination. Thus, the record affirmatively demonstrates that the jurors selected would be impartial in considering defendant's guilt and would follow the principles of law provided by the court. Accordingly, defendant cannot show prejudice resulting from Vezain, Grady, Stielow, and Schutt sitting on the jury.

¶ 32 In reaching this conclusion, we reject defendant's argument that the court inadequately questioned the jurors. Specifically, defendant contends that the court did not uniformly question the potential jurors as to their knowledge of defendant's prior trial. The court is not required to question a potential juror as to the substance of the pretrial publicity knowledge they possess. See *Mu'Min v. Virginia*, 500 U.S. 415, 425 (1991). As discussed above (*supra* ¶ 31), the court properly questioned the potential jurors to ensure their impartiality.

¶ 33 We also reject defendant's argument that the court wrongfully refused to excuse jurors Thompson and Talty for cause based on the fact that they had already formed an opinion as to defendant's guilt. Defendant contends that the court's refusal to strike these jurors for cause forced him to exhaust his peremptory challenges. Therefore, defendant asserts that he was deprived of peremptory challenges to excuse jurors Stielow and Schutt, both of whom had read about defendant's case and were present when potential juror Meyers's explicitly referenced defendant's prior trial.

¶ 34 "[T]he well-settled rule in Illinois is that a court's failure to remove a juror for cause is grounds for reversal only if prejudice can be shown; that is, only if the party challenging the

juror has exercised all of his peremptory challenges and an objectionable juror was allowed to sit on the jury." *In re Commitment of Trulock*, 2012 IL App (3d) 110550, ¶ 45. Even if we were to assume the court's refusal to strike Thompson and Talty for cause constituted error, there would be no reversible error because defendant cannot establish that he suffered any prejudice from the court's ruling. Although defendant had to exhaust his peremptory challenges to remove these two jurors, the record contains no evidence that Stielow and Schutt were improper jurors. Again, the record establishes that Stielow and Schutt had the ability to be fair and impartial jurors.

¶ 35 II. Jury Instructions

¶ 36 Next, defendant contends that appellate counsel provided ineffective assistance in failing to challenge the court's refusal to instruct the jury as to the definitions of intent and knowledge. Even assuming appellate counsel was deficient for failing to raise this issue on appeal, defendant's claim fails because it is not arguable that he suffered prejudice. See *Jones*, 399 Ill. App. 3d at 373.

¶ 37 The circuit court has discretion in deciding how to instruct the jury, and we will not disturb its ruling absent an abuse of that discretion. *People v. Perry*, 2011 IL App (1st) 081228, ¶ 40. "[T]he jury need not be instructed on the terms knowingly and intentionally because those terms have a plain meaning within the jury's common knowledge." *People v. Powell*, 159 Ill. App. 3d 1005, 1013 (1987). Significantly, the committee note to these instructions explicitly states that the "[c]ommittee takes no position as to whether this definition should be routinely given in the absence of a specific jury request." IPI Criminal 4th Nos. 5.01A, 5.01B. Although the court has a duty to instruct the jury when it requests clarification or is manifestly confused (*People v. Sanders*, 368 Ill. App. 3d 533, 537 (2006)), the jury here did not request any

clarification or exhibit any sign of confusion. Therefore, the court did not abuse its discretion in declining to instruct the jury as to the definitions of intent and knowledge.

¶ 38 In reaching this conclusion, we reject defendant's contention that the above instructions were required because defendant's mental state was a critical issue at trial, and the jury demonstrated its difficulty in understanding the differences between the applicable mental states by requesting to review the 911 call transcripts and defendant's interrogation. Defendant fails to cite any authority holding that a circuit court abuses its discretion by refusing to provide a jury with the definitions of intent and knowledge when the jury has not made a request for these definitions. The mere fact that the jury requested to review the video of defendant's interrogation and the transcript of the 911 call recording does not show that the jury had difficulty understanding the common meanings of intent and knowledge. Put simply, commonly understood terms do not require definition by instruction.

¶ 39 CONCLUSION

¶ 40 For foregoing reasons, we affirm the judgment of the circuit court of La Salle County.

¶ 41 Affirmed.