2017 IL App (4th) 150724-U

NO. 4-15-0724

FILED
June 28, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
MARK OUTLAW,	)	No. 07CF6
Defendant-Appellant.	)	
	)	Honorable
	)	Timothy J. Steadman,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Harris and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court correctly concluded that defendant's postconviction petition failed to make a substantial showing that his constitutional right to effective assistance of counsel was violated when his attorney refused to tender a jury instruction on the lesser included offense of attempt (unlawful possession of cocaine). Second-stage dismissal affirmed.

¶ 2 Defendant, Mark Outlaw, is serving a sentence of 28 years' imprisonment for unlawfully possessing a controlled substance with the intent to deliver it (720 ILCS 570/401(a)(2)(B) (West 2006)). He petitioned for postconviction relief. The trial court granted a motion by the State to dismiss his amended petition. He appeals. We affirm the trial court's judgment because, in our *de novo* review (see *People v. Johnson*, 2017 IL 120310, ¶ 14), we conclude that the amended petition fails to make a substantial showing of a constitutional violation.

¶ 3 I. BACKGROUND

¶ 4 A. The Jury Trial

¶ 5 The morning of December 30, 2006, the Decatur police saw defendant leaving town in his Dodge Charger. They set up surveillance on Interstate Highway 72 to intercept him on his way back into town, because they suspected him of transporting drugs. In the evening, defendant drove back into town, and a police officer tried to pull him over for failing to use a turn signal. Instead of pulling over, defendant sped away. The police caught up with him after he pulled into a driveway. They arrested him for fleeing, and they took him to the police station. In the meantime, police officers retraced what they believed had been the route of defendant's flight, and a few blocks from where he had been arrested, they found a bag with 374.7 grams of cocaine in it. They took possession of this bag of cocaine, replaced it with a decoy bag containing rocks, and set up surveillance. At 12:10 the next morning, after defendant was released from the police station, he returned to the neighborhood where he had been arrested, walked up to the decoy bag, picked it up, looked inside it, and set it back down. The police arrested him again, this time for the narcotics offense.

¶ 6 The jury found defendant guilty of unlawfully possessing a controlled substance with the intent to deliver it (720 ILCS 570/401(a)(2)(B) (West 2006)).

¶ 7 B. The Direct Appeal

¶ 8 On direct appeal, defendant made the following arguments: (1) the trial court erred by denying his motion to suppress evidence, given that while he was in custody, police officers continued questioning him after he invoked his right to counsel; (2) he was denied a fair trial in that the State's witnesses repeatedly alluded to evidence of other crimes; (3) the court erred by allowing a detective to opine, in his testimony, that defendant intended to deliver the cocaine; and (4) the court erred by coercing a single "holdout" juror to surrender his or her

individual judgment. *People v. Outlaw*, 388 Ill. App. 3d 1072, 1074 (2009). Unpersuaded by those arguments, we affirmed the trial court's judgment. *Id.*

¶ 9 C. The Postconviction Proceedings

¶ 10 On June 29, 2012, defendant filed an amended petition for postconviction relief, which adopted and incorporated the claims he had made in his previous, *pro se* petition. One of those claims was that trial counsel had rendered ineffective assistance by refusing his request to tender a jury instruction on "attempted possession of a controlled substance and possession of a 'look-alike' substance"—lesser offenses that, according to defendant, were included in the charged offense. The amended petition added that appellate counsel had rendered ineffective assistance by failing to raise this claim in the direct appeal.

¶ 11 The State moved to dismiss the amended petition as legally insufficient. In a hearing on the motion for dismissal, the trial court granted the motion, finding the trial record to be devoid of evidence to support an instruction on a lesser included offense.

¶ 12 Defendant appealed, and, in a summary order, we found that postconviction counsel had failed to provide reasonable assistance. We held the assistance had been less than reasonable because the amended petition lacked an affidavit by defendant stating that he had in fact requested trial counsel to tender an instruction on a lesser included offense. Having made this claim, counsel was obliged to substantiate it by the necessary affidavit. *People v. Outlaw*, No. 4-12-1011 (Mar. 31, 2014) (unpublished summary order under Supreme Court Rule 23(c)(2)).

¶ 13 On remand, postconviction counsel filed a new certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013), as well as an affidavit by defendant that he had told trial counsel he wanted the jury instructed on the lesser included offenses of attempt

(unlawful possession of a controlled substance) and attempt (possession of a look-alike substance).

¶ 14 Again, the trial court granted the State's motion for dismissal, reasoning as follows:

> "It simply was not objectively reasonable to tender a proposed lesser included offense for which the evidence did not merit. There was some testimony about a cloth decoy bag that—long story short but in any event that could not be attempt regarding the decoy because the cloth bag did not contain a controlled substance. So, again there's no—under *Strickland v. Washington*[, 466 U.S. 668, 687-88 (1984),] there's no objective unreasonableness on the part of counsel in failing to tender any purported lesser included offense."

¶ 15 II. ANALYSIS

¶ 16 Defendant argues his trial counsel rendered ineffective assistance by refusing his request to tender a jury instruction on the lesser included offense of attempt (unlawful possession of a controlled substance) (720 ILCS 5/8-4 (West 2006); 720 ILCS 570/401(a)(2)(B) (West 2006)). See 720 ILCS 5/2-9(b) (West 2006) (" 'Included offense' means an offense which *** [c]onsists of an attempt to commit the offense charged or an offense included therein.").

¶ 17 To prevail on his claim that he received ineffective assistance from trial counsel, defendant must establish two propositions: (1) counsel's performance was objectively unreasonable "under prevailing professional norms"; and (2) "there is a reasonable probability that, but for counsel's unprofessional errors," the outcome of the case would have been more favorable to defendant. *Strickland*, 466 U.S. at 688, 694; *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984) (adopting the standard in *Strickland* for challenges to the effectiveness of both

retained and appointed counsel). Because both propositions are essential to a claim of ineffective assistance, we may proceed directly to the second proposition without assessing the reasonableness of counsel's performance. *People v. Hale*, 2013 IL 113140, ¶ 17.

¶ 18 Defendant suffered no prejudice because there was no reasonable probability of a more favorable result in the case had trial counsel tendered the proposed included-offense instruction. *Strickland*, 466 U.S. at 694. The trial court would have refused the instruction—and rightly so because the trial record contains no evidence to justify the giving of such an instruction.

¶ 19 It is true that only "very slight evidence upon a given theory of a case will justify giving an instruction" on a lesser included offense (*People v. Whitelow*, 162 Ill. App. 3d 626, 629 (1987)), but the theory of the case has to be that *instead of* committing the greater offense, the defendant committed the lesser included offense (*People v. Cardamone*, 381 Ill. App. 3d 462, 508 (2008)). "A defendant is entitled to a lesser[-]included[-]offense instruction only if an examination of the evidence reveals that it would permit a jury to rationally find the defendant guilty of the lesser offense yet acquit the defendant of the greater offense." *People v. Hamilton*, 179 Ill. 2d 319, 324 (1997).

¶ 20 In the present case, a jury could have reasonably found defendant guilty of attempted unlawful possession of a controlled substance, given his behavior of returning to the scene, locating the decoy bag, and picking it up, only if the jury *also* found he previously committed unlawful possession of a controlled substance by possessing an actual bag of cocaine in the first place and dropping it there, during his flight from the police. He could have had the intentional mental state necessary to attempted unlawful possession of a controlled substance only if he assumed (as it turned out incorrectly) that the decoy bag contained cocaine—an

assumption he could have had only on the basis of his previous knowing possession of an actual bag of cocaine, which he had left at that very spot.

¶ 21 In sum, a reasonable jury could have found defendant *first* committed the greater offense, unlawful possession of a controlled substance with the intent to deliver it, and that he *afterward* committed the lesser offense, attempt (unlawful possession of a controlled substance), but a reasonable jury would not have acquitted him of the greater offense while finding him guilty of the lesser offense. The lesser offense was possible only because it was preceded by the greater offense. Thus, we find no prejudice from trial counsel's refusal to tender the unjustified instruction on the lesser included offense of attempt (unlawful possession of a controlled substance). See *Strickland*, 466 U.S. at 694; *Hale*, 2013 IL 113140, ¶ 17.

¶ 22 III. CONCLUSION

¶ 23 For the foregoing reasons, we affirm the trial court's judgment, and we award the State $50 in costs. 55 ILCS 5/4-2002 (West 2016).

¶ 24 Affirmed.