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2018 IL App (3d) 160109-U

Order filed April 24, 2018

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-16-0109
)	Circuit No. 11-CF-1173
TERRENCE D. HOWARD,)	Honorable
Defendant-Appellant.)	John P. Vespa, Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice Carter and Justice Holdridge concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's postconviction petition did not make a substantial showing of ineffective assistance of counsel where counsel's decision not to challenge the foundation for the State's expert's testimony was attributable to trial strategy.

¶ 2 Defendant, Terrence D. Howard, appeals from the circuit court's second-stage dismissal of his postconviction petition. Defendant argues the court's order was in error because he made a substantial showing of ineffective assistance of trial counsel where counsel neglected to challenge the foundation for the State's expert witness. We affirm.

¶ 3

FACTS

¶ 4 In April 2012, the State tried defendant before a jury on charges of domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2010)) and unlawful possession with intent to deliver a controlled substance (720 ILCS 570/401(a)(2)(A) (West 2010)). The trial evidence established that on November 28, 2011, defendant confronted his on-and-off girlfriend, Zoya Code, at the Sleep Inn hotel in Peoria. Code recalled that defendant was wearing a jacket and appeared to be under the influence of drugs. The confrontation became a physical altercation that proceeded into the parking lot. The Peoria police responded to the scene and defendant ran away. Two Peoria police officers saw defendant remove his jacket before he fled the parking lot. Inside the jacket the officers located two sandwich bags that contained several individually wrapped plastic baggies that contained a white substance. Illinois State Police forensic scientist Aaron Roemer testified that he had a degree in biological sciences and 10 years of experience analyzing drugs and cannabis. Roemer was classified as an expert witness in the area of forensic chemistry and identification of narcotic substances without objection from defense counsel. Roemer analyzed the white substance that the officers found in the jacket. Roemer weighed 6 of the 13 small bags, and conducted a color reagent test. The combined weight of the substance in the first six bags was 15.5 grams. The color reagent test indicated the presence of cocaine. Roemer confirmed this result with a second test that indicated the six bags contained cocaine. Roemer did not test the remaining seven bags because there was not enough substance left to reach the next statutory charge. Roemer opined that the “chunky substance from six bags [was] indeed cocaine.” Defense counsel did not cross-examine Roemer.

¶ 5 Defense counsel called Sandra Simons to testify. Simons and defendant were friends. On the date of the incident, Simons sat in a parked vehicle at the Sleep Inn hotel while she

waited to pick up another friend. Simons saw a black male run out of the hotel. The man was between five feet nine and five feet ten inches tall and had short to medium dreadlocks with red tips. Simons stated she had never seen this man before. The man wore a maroon-colored jacket. As he left the hotel, the man bickered with Code. When the police arrived, the man ran from the parking lot. Simons never saw defendant at the scene.

¶ 6 In his closing argument, defense counsel argued that an unnamed individual had committed the charged offenses. Counsel contended that Code fabricated her testimony because the State had threatened to take custody of her children if she refused to testify in the instant case. Defense counsel also argued that the State presented no physical evidence to show defendant possessed the plastic baggies that contained cocaine. Counsel asserted that Simons's version of events was credible.

¶ 7 The jury found defendant guilty of both charged offenses. The court sentenced defendant to a total of 20 years' imprisonment. On direct appeal, we affirmed defendant's convictions. *People v. Howard*, 2014 IL App (3d) 120738-U.

¶ 8 On November 14, 2014, defendant filed a *pro se* postconviction petition. The petition contended the State failed to establish a proper foundation for Roemer's testimony regarding the identification and weight of the cocaine. Roemer's testimony did not identify the equipment that he used to test the substance and did not confirm that the equipment was in proper working order. Further, the petition alleged that defense counsel's failure to object to this issue constituted ineffective assistance as an objection would have excluded Roemer's testimony and prevented the State from proving its case. The petition also alleged that appellate counsel was ineffective for failing to raise this issue.

¶ 9 More than 90 days after defendant filed the *pro se* postconviction petition, the court advanced it to the second stage of proceedings and appointed counsel to represent defendant. Defense counsel stood on defendant’s *pro se* petition. The State filed a motion to dismiss the petition. After hearing arguments of the parties, the court entered a written order that granted the State’s motion to dismiss defendant’s postconviction petition. The court found that defendant’s trial defense was that he did not possess the cocaine, and therefore, counsel’s decision not to contest the basis for Roemer’s opinion was strategic.

¶ 10 ANALYSIS

¶ 11 Defendant argues the court erred in dismissing his postconviction petition because it made a substantial showing that counsel provided ineffective assistance when he neglected to challenge the lack of foundation for Roemer’s testimony. We find counsel’s inaction to be strategic, as objecting or cross-examining Roemer on the lack of foundation was both inconsistent with the defense of not possessing the narcotics and would needlessly bolster Roemer’s credibility.

¶ 12 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2014)) sets forth a three-stage proceeding for individuals convicted of a criminal offense to challenge their convictions on grounds of a constitutional violation. *People v. Domagala*, 2013 IL 113688, ¶ 32. To advance from the second to the third stage of postconviction proceedings, a defendant must make a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). To make a substantial showing, “the allegations in the petition must be supported by the record in the case or by its accompanying affidavits.” *People v. Coleman*, 183 Ill. 2d 366, 381 (1998).

¶ 13 To warrant second-stage proceedings on a claim of ineffective assistance, defendant must make a substantial showing that counsel’s performance was deficient and that the deficient performance prejudiced defendant. *Domagala*, 2013 IL 113688, ¶ 36 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). Defendant must specifically show that counsel’s performance was objectively unreasonable under prevailing professional norms and 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. Defendant must overcome the strong presumption that counsel’s inaction was the product of sound trial strategy. *Coleman*, 183 Ill. 2d at 397.

¶ 14 When an expert’s testimony is based upon the results of an electronic or mechanical device, they must offer some foundation as to the method of recording the information and proof that the device was functioning properly at the time of use. *People v. Thompson*, 2017 IL App (3d) 160503, ¶ 13. Counsel’s decision of “[w]hether to object to matters such as foundation for evidence is, by and large, a matter of trial strategy.” *People v. Probst*, 344 Ill. App. 3d 378, 387 (2003); see also *People v. Diaz*, 377 Ill. App. 3d 339, 349-50 (2007) (counsel’s failure to object to the lack of foundation for the horizontal gaze nystagmus test was a matter of trial strategy).

¶ 15 Here, the State did not elicit testimony from Roemer regarding the method he used to weigh and test the substance retrieved from the jacket. Defense counsel’s decision not to object or cross-examine Roemer on the lack of foundation was strategic as it was inconsistent with defendant’s trial strategy of denying that he was at the scene or possessed the narcotics. An objection to the lack of foundation or cross-examination on the issue would needlessly draw attention to a point that was irrelevant to defendant’s defense. Moreover, an objection or cross-examination risked bolstering Roemer’s testimony because Roemer was an Illinois State Police

forensic scientist with 10 years of experience, and he reasonably could have presented the foundational information. See *People v. Dickerson*, 393 Ill. App. 3d 531, 533 (2009) (Roemer’s testimony, that was subject to “vigorous” cross-examination, established an item found on defendant contained 1.06 grams of cocaine); see also *People v. Shamhart*, 2016 IL App (5th) 130589, ¶ 13 (Roemer opined that two baggies containing a white powder and analyzed by the Illinois State Police crime laboratory contained methamphetamine). Therefore, we conclude that defendant’s postconviction petition did not make a substantial showing that he received ineffective assistance of appellate and trial counsel.

¶ 16

CONCLUSION

¶ 17

The judgment of the circuit court of Peoria County is affirmed.

¶ 18

Affirmed.