2019 IL App (1st) 161545-U

No. 1-16-1545

Order filed June 13, 2019

Fourth 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. 09 CR 4293
	)	
KENNETH WARE,	)	Honorable
	)	Alfredo Maldonado,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Gordon and Reyes concurred in the judgment.

ORDER

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

¶ 2 Defendant Kenneth Ware appeals the trial court's order granting the State's motion to dismiss his *pro se* postconviction petition for relief filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). He contends that he made a substantial showing

that his trial counsel was ineffective for interfering with his right to testify at trial by providing him with erroneous information regarding his claim of self-defense. We affirm.

¶ 3 Following a 2009 bench trial, defendant was convicted of second degree murder of Lionel Bolden and sentenced to 17 years' imprisonment. We affirmed on direct appeal over defendant's contention that his sentence was excessive. *People v. Ware*, 1-09-3280 (2011) (summary order). We recount the facts here to the extent necessary to resolve the issue raised on appeal.

¶ 4 The record shows defendant was charged with various counts of armed robbery and first degree murder for the shooting death of Bolden. Prior to trial, defendant informed the State that he would be raising the affirmative defense of self-defense. He also informed the State that Bolden's relatives, Brandy, Sade, and Renee Bolden were potential *People v. Lynch*, 104 Ill. 2d 194 (1984), witnesses who "may or may not testify" that Bolden was on parole from a 1989 murder conviction at the time of his death.

¶ 5 During opening statements, defense counsel argued that defendant acted in self-defense when Bolden attempted to retrieve the money he lost during a dice game between the two men. Counsel stated Bolden was the initial aggressor and the gun used during the shooting belonged to Bolden.

¶ 6 At trial, Brandy Bolden testified that in March 2008, she lived in her grandmother Renee Bolden's house on South Aberdeen Street with her mother, Erica; cousins, Sade and Mikesha; and Bolden, her uncle.[1] Her cousin Mykia Bolden was at the house on March 16, 2008. Brandy's room was on the second floor of the house next to Bolden's room. There was a third bedroom on

[1] Because Bolden's relatives share his last name, we refer to them by their first names.

that floor used for storage. On that day, Bolden was in his room with defendant. Brandy had known defendant for three to four years at that time because he was friends with her mother and Bolden and "used to stay by [her] old house." Around noon or 1 p.m., Brandy woke up and heard "rumbling" from Bolden's bedroom. She knocked on Bolden's door and asked if everything was okay. Bolden opened the door slightly and said, "yeah," so Brandy returned to her room.

¶ 7 Brandy thereafter heard the two men arguing in a landing area in the hallway. She exited her room and saw them "tussling" over a gun. Bolden was on top of a TV with his back in a hole in the wall "that they made" during the fight. Defendant was on top of Bolden and both men had their hands on the gun. Brandy attempted to break up their fight and saw "a fire from the gun" as it fired toward Bolden. Following the shot, she went back into her room and called the police. She then hid in the closet with her cousin. Brandy subsequently heard more gunshots and defendant going downstairs saying, "Lord, please forgive me." Bolden was lying on the floor holding a sweater that defendant had been wearing earlier. Brandy did not see the gun near Bolden. She had never seen the gun before that date. She identified several photographs of the scene, which included a photograph of a black object on the floor of the storage bedroom. Brandy had never seen the black object before and had not heard it referred to as a "speed-loader." In February 2009, Brandy identified defendant in a physical lineup as the shooter.

¶ 8 On cross-examination, Brandy testified defendant had initially come over to her grandmother's house during the day on March 15, 2008. She did not see defendant leave that day, and he was still there the following day. Counsel attempted to ask Brandy about whether Bolden was on electronic monitoring at the time of the shooting, but the trial court sustained the State's objection. Brandy remembered seeing blood on Bolden's pants and telling officers

initially that he had been shot in the leg. She did not recall telling officers that the shooter walked away and then turned around and shot Bolden three times in the head.

¶ 9 Sade Bolden testified that on March 16, 2008, she was sleeping around 1 p.m. and was awakened by a "loud crash or boom." She exited her room and saw Bolden and defendant in the hallway "[t]ussling over a gun." Defendant had been holding the gun and was standing over Bolden. Sade heard her grandmother calling her name so she went downstairs. While downstairs, she heard four gunshots and saw defendant running down the stairs holding a sweater. Defendant said, "The Lord gonna forgive me." Sade never saw Bolden with a gun that day and had never seen a gun in the house before. In February 2009, Sade identified defendant as Bolden's shooter in a physical lineup.

¶ 10 Kandyce Bynum testified Bolden was the uncle of her two eldest children. On March 16, 2008, she was driving to Bolden's residence on South Aberdeen to drop some clothes off for her daughter, Mykia. As Bynum was parking in front of the house, she heard four gunshots coming from the house. She heard one gunshot, a pause, and then three more shots. Bynum sat in her car because she was not sure that the sounds were actually gunshots. She subsequently got out of her car with two of her children and rang the doorbell of the house. A man whom she did not know opened the door. He was rushing out of the house and shaking. The man ran down the stairs and across the street. Bynum proceeded into the house and saw her daughter screaming. Sade, Brandy, and Erica were also present. In February 2009, Bynum identified defendant in a physical lineup as the man she saw rushing out the door of the Bolden residence.

¶ 11 Richard Strugala, a Chicago police forensic investigator, testified that he photographed the scene, including two bullet holes in two walls in the hallway landing. He also photographed a

"black leather double case that holds speed-loaders" in one of the bedrooms. Other photographs of the scene depicted dice and money on the hallway landing. In addition to the black leather case, Strugala recovered and inventoried five live rounds in a speed-loader found in a closet and six live rounds in a speed-loader found near Bolden. He swabbed Bolden for gunshot residue and blood. Bolden had an electronic monitoring device on his ankle.

¶ 12 Chicago police detective Glenn Turner testified he arrived at the scene on March 16, 2008, and spoke with Renee, Brandy, Sade, and Bynum. He observed bullet holes in the wall of the landing and the ceiling of an adjacent room. Based on his investigation, he learned defendant's name when he left the house on South Aberdeen. In February 2009, Turner located and arrested defendant in Alabama.

¶ 13 The parties stipulated that, if called, forensic scientist Leah Kane would testify that she received two inventories, each containing a fired bullet. The bullets were fired from the same gun. They further stipulated that, if called, medical examiner Dr. James Filkins would testify Bolden died of multiple gunshot wounds and the manner of death was homicide.

¶ 14 Following the State's case in chief, the court granted the defense motion for a directed finding on the armed robbery counts. The defense proceeded by way of stipulation. The parties stipulated that, if called, forensic scientist Ellen Conley would testify that the results of a gunshot residue test showed Bolden discharged a firearm, contacted a primer gunshot residue (PGSR) related item or had both hands in the environment of a discharged firearm. The parties additionally stipulated that Bolden had prior 1989 convictions for first degree murder, armed violence, and aggravated battery. Finally, the parties stipulated that, if called, Chicago police officer "J. O'Donnell" would testify he spoke with Brandy at the house on South Aberdeen and

she stated that she tried to help but defendant shot Bolden in the leg. Brandy also stated that defendant walked away, turned back to Bolden and said "God help me," and then shot Bolden three times in the head before fleeing the house. The defense sought to admit a photograph of Bolden's "ankle bracelet."

¶ 15 The court subsequently admonished defendant regarding his right to testify:

> "[Defendant], you have a constitutional right to testify in this case, you also have a constitutional right not to testify. You're the only person in the whole world that can make this decision. After listening to the testimony in this case and discussing this matter with your attorney, is it your desire to testify or not testify in this case?
>
> [DEFENDANT]: Not.
>
> [THE COURT]: Based upon my observations of [defendant] in the pendency of the case and I find his [*sic*] knowing and voluntarily making this decision."

¶ 16 In closing, defense counsel argued that it was "obvious from the physical evidence" that there was a dispute about who was winning the dice game that defendant and Bolden had been playing. He argued it was "pure and simply a case of self-defense." It was uncontradicted that the men were fighting over a gun and pointed out that Bolden's hands tested positive for gunshot residue. Based on this evidence, counsel argued it could be inferred that the gun was discharged during the fight. Counsel emphasized that the speed loaders recovered from Bolden's house showed that the gun belonged to Bolden, and that Bolden was the initial aggressor who escalated the fight by pulling out a gun. Counsel additionally noted that defendant had been at Bolden's house for over 12 hours, which demonstrated he did not go there with the intent to rob or kill Bolden.

¶ 17 Following closing arguments, the court found defendant guilty of second degree murder. In announcing its ruling, the court noted that there was "not sufficient evidence to provide any self defense in this case," but found sufficient grounds for the offense of second degree murder. The court sentenced defendant to 17 years' imprisonment.

¶ 18 On direct appeal, defendant challenged his sentence as excessive. We affirmed his conviction in *Ware*, 1-09-3280 (2011) (summary order).

¶ 19 On January 10, 2012, defendant filed a *pro se* postconviction petition under the Act, arguing, in relevant part, that trial counsel was ineffective for misinforming him that he did not need to testify in order to assert a claim of self-defense. Defendant argued he was "the only person who could give evidence of self-defense, but defense counsel felt otherwise" and "convinced" him not to testify.

¶ 20 In support of his petition, defendant attached his own affidavit in which he averred the following. Defendant informed counsel prior to trial that he wanted to testify to tell his "side of the story" to show he was acting in self-defense. Counsel responded that he (counsel) would decide after the State presented its case in chief. When the time came, counsel told defendant they were "up on points, why would [defendant] give them anything to use against [him]!" Counsel analogized the trial to a football game, stating the defense was "up in the 4th quarter, with a few seconds left to play" and did not want to "give the other team the ball, so they can score and win the game with the time running out." Counsel further stated that defendant was the only person who could " 'f***' this [case] up."

¶ 21 In his petition, defendant also averred to his version of events. According to defendant, on the night of the shooting, Brandy admitted him into Bolden's house between 10:30 and 11

p.m. Defendant went to Bolden's room on the third floor, where Bolden and two friends were playing dice. Defendant noticed Bolden was losing money during the game. After a half hour, defendant joined the game and eventually was winning over $300. Bolden was still losing money. Bolden's two friends left around 3 a.m., and defendant and Bolden continued gambling. Around 8 or 9 a.m., Bolden's parole officer arrived to check on Bolden.

¶ 22 Several hours later, the two men ended their game with defendant winning. As he was counting his money, Bolden "eased behind" him, struck him across the face with a gun, and pointed the gun at him. Defendant threw the money on the floor and "charged" Bolden, grabbing the gun. As they "tussl[ed]" over the gun, the gun went off, firing shots with Bolden's hand on the trigger. Defendant tried to point the gun away from himself, and Bolden was shot during the fight. Defendant averred counsel knew this version of events but "convinced" him not to take the stand.

¶ 23 On February 10, 2012, the trial court docketed the petition for second stage proceedings and appointed the office of the Public Defender to represent defendant. Counsel filed a Rule 651(c) certificate and did not amend defendant's petition. Defendant was not satisfied with postconviction counsel's representation and elected to proceed *pro se*.

¶ 24 On September 10, 2015, defendant filed an untitled document in which he argued that trial counsel's performance was not sound trial strategy. Defendant specifically alleged that counsel argued a self-defense theory in closing arguments but failed to present evidence, such as defendant's testimony, in support of that theory. Defendant claimed he was prejudiced because counsel effectively left him with no defense.

¶ 25 On December 8, 2015, the State filed a motion to dismiss defendant's petition, arguing defendant's claims were waived because they could have been raised on direct appeal and counsel properly advised defendant regarding whether he should testify. Defendant did not file a response to the State's motion.

¶ 26 Following arguments, the trial court granted the State's motion to dismiss on April 13, 2016. In doing so, the trial court found, in pertinent part, defendant failed to make a substantial showing of a claim of ineffective assistance of counsel for interfering with his right to testify because he failed attach evidence showing counsel "exercised undue influence on [defendant's] decision not to testify." The court noted defendant had been admonished by the trial court regarding his right to testify, and defendant knowingly and voluntarily waived that right.

¶ 27 On appeal, defendant claims that the trial court erroneously dismissed his petition because he made a substantial showing that trial counsel was ineffective for interfering with his right to testify at trial. Specifically, he argues that counsel "provided erroneous information that usurped" his right to testify regarding his claim of self-defense, which ultimately deprived him of putting on a defense.

¶ 28 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 2012). 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 2012).

¶ 29 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 this stage, the trial court is "concerned merely with determining whether the petition's allegations sufficiently demonstrate a constitutional infirmity which would necessitate relief under the Act" (*People v. Coleman*, 183 Ill. 2d 366, 380 (1998)), 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)). The defendant "bears the burden of making a substantial showing of a constitutional violation." *Id.* We review *de novo* the trial court's dismissal of defendant's postconviction petition without an evidentiary hearing. *Id*.

¶ 30 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.

¶ 31 In this case, defendant claims that counsel was ineffective for interfering with his right to testify at trial. A defendant's right to testify at trial is a fundamental constitutional right, as is his right to choose not to testify. *People v. Madej*, 177 Ill. 2d 116, 145-46 (1997), *overruled in part on other grounds by Coleman*, 183 Ill. 2d 366; see also *Rock v. Arkansas*, 483 U.S. 44, 52-53 (1987). The decision whether to testify ultimately rests with the defendant. *Madej*, 177 Ill. 2d at 146. Therefore, it is not one of those matters which is considered a strategic or tactical decision best left to trial counsel. *Madej*, 177 Ill. 2d at 146. However, "[a]dvice not to testify is a matter of trial strategy and does not constitute ineffective assistance of counsel unless evidence suggests that counsel refused to allow the defendant to testify." *People v. Youngblood*, 389 Ill. App. 3d 209, 217 (2009). Only the defendant may waive his right to testify. *Madej*, 177 Ill. 2d at 146. "When a defendant's postconviction claim that his trial counsel was ineffective for refusing to allow the defendant to testify is dismissed, the reviewing court must affirm the dismissal unless, during the defendant's trial, the defendant made a 'contemporaneous assertion *** of his right to testify.' " *Youngblood*, 389 Ill. App. 3d at 217 (quoting *People v. Brown*, 54 Ill. 2d 21, 24 (1973)).

¶ 32 After reviewing the record, we find the trial court did not err in dismissing defendant's petition where he failed to demonstrate a substantial claim of ineffective assistance of counsel because he did not show counsel refused to allow him to testify. In his affidavit, defendant averred that he told counsel he wanted to testify to tell his side of the story *prior to trial*, but counsel said "he would decide when the State rested its case." When they were discussing whether defendant would testify, counsel compared the trial to a football game and told him they

were "up in the 4th quarter" and that defendant "was the only person who could 'f***' this up." Defendant later averred counsel knew he acted in self-defense but "convinced" him not to testify.

¶ 33 Taking defendant's allegations as true, as we must, we find his petition shows only that counsel advised against defendant testifying, which was within the scope of counsel's representation (see *People v. Smith*, 176 Ill. 2d 217, 235 (1997) (the decision regarding whether to testify is the defendant's alone, but should be made with the advice of counsel)). Indeed, "counsel is free to urge his professional opinion on his client." *People v. Knox*, 58 Ill. App. 3d 761, 767 (1978). Defendant's own words—that counsel "convinced" him not to testify—are indicative of advice of counsel rather than a usurpation of defendant's right. Defendant does not allege that counsel prevented him from testifying, nor does he claim that he did not know he had a right to testify. Critically, he also does not claim that he made a contemporaneous assertion of his right to testify when the defense presented evidence. *Enis*, 194 Ill. 2d at 399 (where a defendant expresses his desire to testify prior to trial but then remains silent when his counsel rests the case without calling him to testify, he is deemed to have "acquiesced in counsel's view that defendant should not take the stand."). Further, defendant was admonished regarding his right to testify by the trial court, and the record shows he knowingly waived that right. Under these circumstances, defendant failed to make a substantial showing that counsel's performance was deficient in advising him not to testify. *People v. Patterson*, 192 Ill. 2d 93, 107 (2000) (the defendant must satisfy both prongs of the *Strickland* test to demonstrate a claim of ineffective assistance of counsel).

¶ 34 In reaching this conclusion, we necessarily reject defendant's contention that counsel provided "erroneous information" which usurped his right to testify. Although defendant was

ultimately convicted of second degree murder, this did not render counsel's professional opinion that defendant should not testify because they were "up on points" "erroneous information." As mentioned, contrary to defendant's argument that counsel gave him erroneous advice to dissuade him from testifying, counsel gave his professional opinion, based on the evidence in this case, that taking the stand would be detrimental to defendant. See *Knox*, 58 Ill. App. 3d at 767 (when counsel's statement amounts to no more than this professional opinion based on the circumstances presented by the case, the statement cannot form the basis of a claim that the advice was not objectively reasonable). The court in *Knox* specifically cautioned against blindly accepting claims such as the one defendant makes here:

> " 'By hypothesis, in every case in which the issue is raised, the lawyer's advice [not to testify] will in retrospect appear to the defendant to have been bad advice, and he will stand to gain if he can succeed in establishing that he did not testify because his lawyer refused to permit him to do so.' " *Knox*, 58 Ill. App. 3d at 767-68 (quoting *People v. Brown*, 54 Ill. 2d 21, 24 (1973).

¶ 35 Defendant nevertheless maintains that because counsel presented the affirmative defense of self-defense he should have presented defendant's testimony in support of that theory. However, although defendant's affirmative defense of self defense was ultimately unsuccessful, the mere fact that counsel's strategy was unsuccessful does not render counsel ineffective. See *e.g.*, *People v. Walton*, 378 Ill. App. 3d 580, 589 (2007). In sum, we find that the trial court properly dismissed defendant's petition.

¶ 36 We affirm the judgment of the circuit court of Cook County.

¶ 37 Affirmed.