2019 IL App (1st) 161714-U

No. 1-16-1714

Order filed July 18, 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. 13 CR 9155
	)	
JAVIER VALDEZ,	)	Honorable
	)	Kevin M. Sheehan,
Defendant-Appellant.	)	Judge, presiding.

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

ORDER

¶ 1 *Held*: Defendant's convictions for predatory criminal sexual assault of a child are affirmed where the record is insufficient to support his claims of ineffective assistance of trial and posttrial counsel.

¶ 2 Following a jury trial, defendant Javier Valdez was convicted of two counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2006)) and sentenced to a total of 22 years' imprisonment. On appeal, defendant argues (1) trial counsel was ineffective for failing to investigate and call potential alibi witnesses, and (2) posttrial counsel was ineffective

for failing to adequately support the allegations made in defendant's motion for new trial. For the following reasons, we affirm.

¶ 3 Defendant was charged with two counts of predatory criminal sexual assault of a child for contact between his penis and the victim A.V.'s vagina and contact between his mouth and A.V.'s vagina, occurring on or about September 3, 2007, and continuing through September 2, 2009. Prior to trial, the court ruled the State would be allowed to introduce evidence of other crimes stemming from earlier acts defendant perpetrated on A.V. in South Beloit.

¶ 4 At trial, A.V. testified that she was 15 years old. Defendant was her father and was previously married to her mother, Arely Corral. When A.V. was in kindergarten, first, and second grade, she lived in a house in South Beloit with her parents and three of her siblings. A.V. shared a room in that house with two of her sisters. Starting when she was six or seven years old, defendant would enter her room at night while she was asleep and put his hands in her underwear and rub her "girl part," which she later clarified meant her vagina. Defendant touched her vagina while she was in bed "over a few times" in South Beloit. Defendant also sometimes put his leg over her leg while he touched her. She did not say anything to her sisters or cry out because she was scared.

¶ 5 A.V. told her mother twice that defendant was touching her, but the police were never called and nothing changed in their household. After speaking with Corral, A.V. also spoke with defendant, who told her that he would never do it again. Defendant told A.V. to hit him, but she did not. Following the conversations with Corral, defendant would come into A.V.'s bedroom at night, take her underwear off, put his leg over her leg, and put his penis in her vagina, which hurt A.V. When he finished, defendant wiped her vagina because it was wet. Defendant put his penis

inside A.V.'s vagina "a couple times" at the house on South Beloit. He also forced A.V. to grab his "boy part" under his clothes. A.V. never told anyone about the incidents because her mother did not believe her, "so no one else would."

¶ 6 When A.V. was approximately eight years old, she and her family moved to a house in Lyons where they lived for "less than one" grade. In Lyons, A.V. again shared a room with her sisters. She slept on a twin sized mattress on the floor. One night, defendant entered her bedroom, took off her underwear and got on top of her. Defendant moved her leg to the side so that her legs were open and put his penis in her vagina. He moved up and down and did not say anything. Eventually, defendant left. A.V. did not tell her mother about the incident because she did not believe her.

¶ 7 A.V., her parents, and her siblings then moved to an apartment building on Monticello Avenue in Chicago, where A.V. lived from second to fourth grade. They lived in the basement apartment and A.V. shared a bedroom with her sisters. One night while A.V. slept in her parents' room, defendant entered and put his mouth on her vagina and licked it. A.V. moved and defendant stopped licking her, but eventually started licking her again. A.V. moved again and defendant stopped and left the room. She was uncomfortable when defendant licked her. Defendant did not touch her in any other way when she lived in the apartment on Monticello.

¶ 8 At some point, A.V.'s parents stopped living together and divorced in 2008. Defendant stopped touching A.V. when she moved out of the apartment on Monticello when she was in fifth grade. A.V. did not have regular visitation with defendant after that, but she was scared he would touch her again because he touched her chest during one of her visits with him. In April 2013, A.V. told her mother again about the incidents with defendant and her mother contacted

the police. A.V. told the police everything that she had testified to at trial. A doctor examined her after the police were involved. Although it was nighttime during the incidents, she knew the person touching her was defendant because she recognized him and his smell was familiar to her.

¶ 9 A.V. acknowledged she did not tell any of her teachers about the incidents while she was in school. She also acknowledged that, at one point, when her mother asked if she was making it up, A.V. said she was. However, A.V. testified that she was not telling the truth when she said she made up the incidents with defendant. A.V. also acknowledged that she told police that she thought her sister was asleep on the mattress next to her when defendant put his penis in her vagina in the house in Lyons. She clarified that she told police her sister might have been on a mattress next to her. A.V. acknowledged that she told her mother she had nightmares as a child, but did not actually suffer from nightmares.

¶ 10 Arely Corral, A.V.'s mother, testified she had six children, including A.V. She was married to defendant for 10 years and they divorced in August 2010. Corral, defendant, and their children lived in South Beloit from approximately November 2005 until July 2007. Corral was drinking heavily at this time and her relationship with defendant was "chaotic." While living in South Beloit, A.V. and Corral had an "unusual" conversation when A.V. was approximately six years old. A.V. appeared scared during the conversation. Following that talk, Corral spoke with defendant and then spoke with A.V. again. A.V. became "a lot more distant" following these conversations. Corral acknowledged that, following her conversation with defendant, she asked A.V. whether she was making up her allegations against defendant and A.V. admitted she made them up.

¶ 11 The family moved to Lyons and lived there from approximately August 2007 until March 2008. They then relocated to Chicago, where they lived on Monticello Avenue. In 2009, Corral and defendant separated, and Corral moved out of the Monticello residence with their children. After they moved out of the Monticello residence, A.V. would occasionally visit defendant. At some point, however, A.V. stopped wanting to visit defendant. Approximately two months after that point, A.V. spoke with Corral. She could not remember exactly when their conversation was, but it "could have" been in 2013. Following that conversation, Corral contacted the police.

¶ 12 Corral was dependent on defendant, who worked and paid their bills. Corral and defendant were "intimate" while they were married. Defendant had a habit of taking off his shirt and wiping himself and then Corral down after each time they were intimate. She acknowledged that she did not tell anyone about this conduct until she informed the assistant State's Attorneys a week prior to trial.

¶ 13 Dr. Marjorie Fujara, an attending physician on the Child Protective Services Team at Stroger Hospital, was qualified as expert in child abuse pediatrics and diagnosis of children of sexual abuse. Dr. Fujara testified she conducted an examination of A.V. on April 10, 2013. A.V. told her that her father had touched her "girl part" with his hands, mouth, and "boy part." During the physical examination, Dr. Fujara observed an abnormal area where part of A.V.'s hymen was "missing completely," indicating A.V. had been penetrated. Based on the examination and Dr. Fujara's experience, she concluded within a reasonable degree of scientific certainty that A.V.'s abnormal anogenital exam was indicative of penetration and consistent with a history of sexual abuse.

¶ 14 The State rested, and the court subsequently denied the defense motion for a directed verdict. The court then admonished defendant about his right to testify:

"THE COURT: [Defendant], your lawyer has indicated that you're anticipating resting; is that right?

[TRIAL COUNSEL]: Yes, sir.

THE COURT: And he's indicated to the Court that it is your wish not to testify; is that right?

[DEFENDANT]: Yes, sir, Your Honor.

THE COURT: [Defendant], your attorney has advised that Court that you do not wish to take the witness stand to testify on your own behalf. Do you understand that whether or not you take the witness stand in this trial to testify on your own behalf is your decision and your decision alone to make?

[DEFENDANT]: Yes, Your Honor.

THE COURT: And you discussed that with your attorney, sir; is that right?

[DEFENDANT]: Yes, Your Honor.

THE COURT: Has anyone promised you anything or threatened you in any way to cause you not to testify in this case?

[DEFENDANT]: No, Your Honor.

THE COURT: And you're choosing not to testify of your own free will?

[DEFENDANT]: Yes, Your Honor.

THE COURT: And it's your sole decision not to testify?

[DEFENDANT]: That's correct.

> THE COURT: All right. The Court having spoken to the defendant regarding his right to testify in this case, I believe he's made after thoughtful discussion with his attorney, it was knowingly and voluntarily made of his own free will, and that such decision was not the product of any promises, threats, duress, or coercion of any kind."

¶ 15 Following closing arguments, the jury found defendant guilty of two counts of predatory criminal sexual assault of a child.

¶ 16 Trial counsel filed a motion for a new trial, but defendant requested additional time to hire a new attorney because he "was having problems" with trial counsel. The case was continued several times while defendant attempted to obtain new counsel for posttrial proceedings. Defendant also filed a complaint against trial counsel with the Illinois Attorney Registration and Disciplinary Commission (ARDC).

¶ 17 At one posttrial hearing, defendant requested that the office of the Public Defender be appointed to represent him for his posttrial motion for a new trial and sentencing. The court conducted a preliminary inquiry into defendant's allegations that trial counsel was ineffective. Defendant informed the court that he had not been prepared for trial because trial counsel did not communicate with him prior to trial despite having emails showing he wanted to speak with counsel. Defendant acknowledged, however, that he had wanted to proceed to trial because he "wanted to get the case done." Defendant also told the court that he had a "list of witnesses" that would have testified at trial, including his current wife, Janette Cruz, his father, his divorce attorney, a "psychiatrist-psychology from DCFS." He explained he was "staying" with Cruz and "living in different places" during the period that the offenses were committed. The court informed defendant that which witnesses to call is a matter of trial strategy for counsel.

Defendant then complained that he was not asked whether he wanted a jury or bench trial, but admitted he did not tell his attorney he wanted a bench trial and acknowledged that he participated in jury selection. He alleged he wished to testify, but acknowledged the court admonished him that the decision to testify was his own and that he declined to testify. Defendant argued he never had a conversation with counsel regarding his right to testify.

¶ 18 In response to defendant's allegations, trial counsel told the court that the charges in defendant's case all related to defendant's daughter and there were no other witnesses to the allegations. After further argument by defendant, the following occurred:

> "THE COURT: My point is what's alleged here, the witnesses you are talking about, [trial counsel] has decided not to call for strategy purposes. Is that right, [trial counsel]?"
>
> [TRIAL COUNSEL]: Yes, absolutely. And relevancy."

¶ 19 The court concluded defendant's allegations did not warrant appointing new counsel and continued the case.

¶ 20 Defendant thereafter hired a new attorney who filed a second motion for new trial. In the motion, posttrial counsel argued, in relevant part, that trial counsel was ineffective for (1) failing to interview defendant regarding "his witnesses that [defendant] sent to [trial counsel] via written commitments on many occasions;" (2) failing to interview or call witnesses to (a) support defendant's alibi defense that he was not living with A.V. at the time of the offenses, (b) testify to defendant's "reputation for good character of morality, decency, and chastity," and (c) "provide information and testimony that would directly attack and defeat the credibility of [A.V.] and Corral;" (3) failing to subpoena or review A.V.'s school or medical records; (4) failing to

review defendant's and Corral's divorce file "which would reveal information relative to the credibility" of A.V. and Corral; and (5) preventing defendant from testifying by discouraging and intimidating him.

¶ 21 In support of the motion, posttrial counsel attached a letter from trial counsel to the ARDC, wherein counsel explained he did not call defense witnesses "because there were no eyewitnesses to the alleged offenses." Posttrial counsel also attached an undated text message purportedly between defendant's brother and an associate attorney who worked with trial counsel. Defendant's brother stated, "We went to court today and we will be there tomorrow. [Defendant] gave us a list of witnesses today, but we have been ready for trial." Finally, posttrial counsel attached an affidavit from defendant.

¶ 22 In the affidavit, defendant averred, in relevant part, that he gave trial counsel a list of "approximately" 12 potential alibi, occurrence, and character witnesses, who could impeach the testimony of the State's witnesses. Defendant further informed trial counsel that there were other "documents and school reports that would relate to the complaining witness' credibility." He averred he was not living with Corral and A.V. between 2007 and 2009 when the incidents took place. Cruz, his parents, his brother, and his roommate George Avila were available at the time of trial to testify regarding his residency. Defendant's niece, Angie Ramirez, was also never contacted by trial counsel. Ramirez could have discredited A.V.'s and Corral's testimony and testified regarding Corral's "use of alcohol." Further, defendant informed trial counsel that DCFS interviewed A.V. in July 2011, but she did not mention any sexual abuse. Lastly, defendant averred he asked trial counsel when his witnesses would be called and when he could testify. In response, trial counsel stated "We don't need to prove anything, the State needs to

prove their case. That is not our job, don't worry everything is going to be fine." With regard to defendant testifying, trial counsel stated, "I have nothing to ask you. If you want to make a fool of yourself, go ahead. The State will dance all over you. Just sit down and look innocent."

¶ 23 At the motion hearing, the court asked about defendant's allegation of an alibi, and posttrial counsel clarified trial counsel was ineffective for failing to investigate whether a "viable alibi" existed. The court additionally asked what information defendant had from A.V.'s school and medical records that would have warranted trial counsel obtaining the records. Posttrial counsel responded that "whether or not there exist anything in there, at the bare minimum [trial counsel] was in a duty to investigate these records prior to just assuming that all the evidence would come from the State's discovery."

¶ 24 The court denied defendant's motion. With respect to the claims that trial counsel was ineffective for failing to subpoena A.V.'s school and medical records and review defendant's divorce filing, the court noted that there was no information as to what the records and filing would show. The court found that the claim that the records would bear on A.V.'s and Corral's credibility was "pure speculation." The court also reiterated that defendant voluntarily chose not to testify, and trial counsel's decision not to call additional defense witnesses was strategic. Regarding defendant's alleged alibi, the court found that defendant's residency during the relevant time frame was not an alibi. Moreover, the court pointed out that trial counsel had records of A.V.'s 2011 interview with DCFS because it had been tendered to defense during discovery.

¶ 25 The court thereafter sentenced defendant to two consecutive terms of 11 years' imprisonment.

¶ 26 On appeal, defendant contends (1) trial counsel was ineffective for failing to investigate and call witnesses to testify he did not live with A.V. at the time of the offense, and (2) posttrial counsel was ineffective for failing to sufficiently support defendant's allegations in his motion for a new trial.

¶ 27 Both the United States and Illinois constitutions guarantee criminal defendants the right to effective assistance of counsel. U.S. Const., amends VI, XIV; Ill. Const. 1970, art. 1, § 8; *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984). To prevail on an ineffective assistance of counsel claim, defendant must show that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) the deficient performance so prejudiced defendant as to deny him a fair trial. *Strickland*, 466 U.S. at 667-78. To establish the deficient performance prong, defendant must overcome the presumption that counsel's conduct was the result of trial strategy. *People v. Perry*, 224 Ill. 2d 312, 341-42 (2007).

¶ 28 To show prejudice, defendant must show that, but for counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 687. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The question, therefore, is "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695. The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Patterson*, 192 Ill. 2d 93, 107 (2000).

¶ 29 With respect to his ineffectiveness claim against trial counsel, defendant argues his current wife, parents, brother, and roommate would have testified at trial that he did not live with

A.V. at the time of the incidents. He alleges counsel knew of these witnesses, but failed to investigate and call them so that they could provide him with an alibi. With respect to his allegations against posttrial counsel, defendant argues counsel raised various issues in a posttrial motion relating to trial counsel's failure to investigate (1) alibi and character witnesses, (2) defendant's and Corral's divorce file, (3) a DCFS interview with A.V. from 2011, and (4) A.V.'s school and medical records. Defendant maintains, however, that posttrial counsel failed to provide sufficient details as to what the witnesses would have testified to or what the various reports and files would have revealed, and therefore provided ineffective assistance by failing to support the allegations in the motion.

¶ 30 After reviewing the record, we conclude that it does not contain sufficient information to permit us to review and resolve defendant's claims of ineffectiveness. In reaching this conclusion, we are mindful that our supreme court recently addressed the propriety of appellate courts declining to consider certain claims of ineffective assistance of counsel on direct appeal. *People v. Veach*, 2017 IL 120649, ¶¶ 31, 39. The supreme court cautioned that "ineffective assistance of counsel claims may sometimes be better suited to collateral proceedings *but only* when the record is incomplete or inadequate for resolving the claim." (Emphasis added.) *Id*. at ¶ 46. The court further instructed this court to "carefully consider each ineffective assistance of counsel claim on a case-by-case basis" to determine if the circumstances permit us to adequately address a defendant's ineffective assistance of counsel claim on direct review. *Id*. at ¶ 48.

¶ 31 In this case, we are unable to conduct a meaningful review of defendant's claims without a supplemented record regarding the nature of the evidence defendant alleges should have been

investigated and introduced by both trial and posttrial counsel. Specifically, other than defendant's self-serving statements that his potential witnesses would testify he lived elsewhere at the time of the offenses, the record contains no affidavits from the witnesses or other supporting evidence revealing the nature of their potential testimony. Thus, without more, we cannot determine whether this potential testimony would support defendant's allegations and demonstrate that he was prejudiced by trial counsel's decision not to present the witnesses. Additionally, absent a record of the witnesses' potential testimony and therefore why counsel determined not to call these witnesses, we will not speculate on whether counsel's decision is the product of sound trial strategy. See *People v. McGath*, 2017 IL App (4th) 150608, ¶ 42.

¶ 32 Likewise, the record is silent on any of the information that would support defendant's allegations against posttrial counsel. As defendant points out, the nature of the information contained in his divorce file, the 2011 DCFS interview, and A.V.'s school and medical records is not contained in the record. Nor is any evidence regarding his potential testimony or potential character witness testimony. While defendant argues this is evidence of posttrial counsel's deficient performance, this, on its own, is insufficient to demonstrate that this unknown evidence would change the verdict and is ineffective assistance of counsel. See *People v. Patterson*, 192 Ill. 2d 93, 107 (2000) (the failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel). Because we do not know the contents of the evidence that defendant alleges would undermine A.V.'s and Corral's credibility, we cannot determine whether defendant was prejudiced by trial and posttrial counsel's failure to investigate further and present such evidence before the trial court. Accordingly, we find these claims are better

suited to postconviction proceedings, where defendant is permitted to supplement the record with the necessary supporting evidence to substantiate his claims.

¶ 33 In support of this conclusion, we briefly note that were we to reach the merits of defendant's ineffectiveness claims without a sufficient record, he would be precluded from raising these claims in a postconviction petition despite any evidentiary support he may provide in his petition. See *People v. Coleman*, 168 Ill. 2d 509, 522 (1995) (issues decided on direct appeal are barred from being raised in subsequent proceedings by *res judicata*).

¶ 34 Finally, defendant alleged posttrial counsel was ineffective for failing to support an allegation in his motion for new trial that trial counsel interfered with his right to testify. We point out that defendant does not allege trial counsel was ineffective for interfering with his right to testify, only that posttrial counsel failed to support this allegation in the motion. Nevertheless, we find the record is sufficient to address this particular claim.

¶ 35 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 People v. Coleman,* 183 Ill. 2d 366 (1998); see also *Rock v. Arkansas*, 483 U.S. 44, 52-53 (1987). The decision whether to testify ultimately rests with the defendant and only the defendant may waive this right. *Madej*, 177 Ill. 2d at 146. Therefore, it is not considered a strategic or tactical decision best left to trial counsel. *Id.* 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). A defendant who claims on appeal he was precluded from testifying at

trial must have contemporaneously asserted his right to testify by informing counsel at the time of trial. *People v. Brown,* 54 Ill. 2d 21, 24 (1973).

¶ 36 Contrary to defendant's assertion, posttrial counsel did support the allegation that trial counsel interfered with defendant's right to testify. The record shows that in support of the motion for a new trial, posttrial counsel attached defendant's affidavit. In the affidavit, defendant averred that he asked trial counsel when he could testify and counsel responded, "We don't need to prove anything, the State needs to prove their case. That is not our job, don't worry everything is going to be fine." He further averred trial counsel stated, "I have nothing to ask you. If you want to make a fool of yourself, go ahead. The State will dance all over you. Just sit down and look innocent."

¶ 37 However, despite defendant's affidavit, we find his claim is rebutted by the record. In this case, the record does not show trial counsel refused to allow defendant to testify over his assertion that he wanted to testify on his behalf or that defendant was unaware the decision to testify was his own. Rather, the record shows that the court expressly admonished defendant that the decision to testify was his right alone and defendant acknowledged that he was not coerced or threatened to not testify. The court extensively questioned defendant during the preliminary inquiry into his posttrial claims of ineffective assistance of counsel, and defendant repeatedly agreed that he was admonished that the decision to testify was his alone. As such, defendant's contention that he did not know he could choose to testify is belied by the record.

¶ 38 Moreover, defendant fails to demonstrate that counsel interfered with his right to testify rather than merely advising him not to testify, 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); see also *People v. Knox,* 58 Ill. App. 3d 761, 767 (1978) ("counsel is free to urge his professional opinion on his client"). Defendant, therefore, cannot demonstrate counsel interfered with his right to testify.

¶ 39 In sum, we find the record is insufficient to review defendant's ineffectiveness claim for trial counsel's failure to investigate and call potential alibi witnesses. Similarly, the record is insufficient to review defendant's ineffectiveness claims against posttrial counsel for failing to support the motion for new trial with respect to the additional witnesses and evidence counsel claimed undermined A.V.'s and Corral's credibility. These claims are better suited to postconviction proceedings where defendant may supplement the record with supporting evidence to corroborate his claims. However, the record is sufficient to review defendant's claim that posttrial counsel was ineffective for failing to support the motion for new trial with respect to the claim that trial counsel interfered with his right to testify. Posttrial counsel supported the claim with defendant's affidavit, and the record rebutted defendant's contention that trial counsel interfered with his right to testify.

¶ 40 Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 41 Affirmed.