2019 IL App (1st) 162526-U

No. 1-16-2526

Order filed May 28, 2019

Second 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. 10 CR 15443
	)	
JACK McGEE,	)	Honorable
	)	Mary Margaret Brosnahan,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE MASON delivered the judgment of the court.
Justices Pucinski and Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: Summary dismissal of defendant's postconviction petition is affirmed where counsel on direct appeal was not ineffective for failing to raise an ineffective assistance claim against trial counsel, since trial counsel was not required to dispute the trial court's decision to alter the phrasing of a question posed by trial counsel, and the trial court's *voir dire* questions did not constitute error.

¶ 2 Defendant Jack McGee appeals from the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)). On appeal, McGee contends that his petition stated arguable claims that (1) trial counsel was

ineffective for failing to challenge the trial court's refusal to ask the jury venire members during *voir dire* whether they have been victims of domestic violence, and (2) counsel on direct appeal was ineffective for not raising trial counsel's ineffective assistance. We affirm.

¶ 3 McGee was charged in a 12-count information with multiple offenses arising from an incident in Chicago on August 1, 2010, when he allegedly shot his girlfriend, Kiara Mitchell. The State nol-prossed nine counts and proceeded to trial on one count of attempt first degree murder (720 ILCS 5/8-4(a) (West 2010); 720 ILCS 5/9-1(a)(1) (West Supp. 2009)), one count of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West Supp. 2009)), and one count of aggravated domestic battery (720 ILCS 5/12-3.3(a) (West 2010)). McGee asserted the affirmative defense of accident and elected a jury trial.

¶ 4 Before *voir dire*, one of McGee's two trial attorneys requested that the trial court ask the venire members whether any had been a "victim of domestic violence." The trial court stated that phrasing the question "in the way that you are suggesting" would be "too personal." Nonetheless, the court explained that because the jury venire members would know McGee was charged with aggravated domestic battery, it would ask them whether the nature of that charge "would in any way cause them to be unfair." One of McGee's attorneys said, "That's fine," and the other stated, "I agree with that."

¶ 5 During *voir dire*, the trial court asked that any venire members who "have been the victim of a crime of a very personal sort" disclose such to the court in private, so that the court could speak with them and the attorneys. The trial court explained that "[w]hile we need to get to the information, it's certainly not our intent to make this a horrific event" for anyone. The court

added, "I will be happy to do that to accommodate you if we have something that's sensitive *** along those lines and I think everybody understands the kind of cases that I'm talking about."

¶ 6 Next, the trial court asked the venire members individually whether they, or any friends or family members, had been victims of crimes. One prospective juror stated that she was the victim of domestic violence, and that "my friend was murdered by her boyfriend." She further expressed that hearing the domestic violence charge brought back "all of these emotions" she had "worked through," and that she was unable to listen or focus. Another prospective juror stated, "One of my best friends was murdered by her husband." She stated that she did not know if she could be fair to McGee, and that the allegations against McGee made her mad. A third person stated she was the victim of an armed robbery and kidnapping. She also disclosed that as an advocate for the rights of women and children, she did not "feel that [she] would give an unbiased opinion," and she "immediately judged the defendant as a whole" when she heard the charges. These three venire members were excused for cause with no objection from either party, and they were not placed on the jury. The trial court also asked the jury venire members to raise a hand if the nature of the aggravated domestic battery charge "would in any way cause [them] to not be fair" to the State or defense. A fourth person responded, and she was not placed on the jury.

¶ 7 At trial, Mitchell testified that she was dating McGee on July 31, 2010. That night, she walked with McGee and a man later identified as Daniel Brown to a grocery store. During this trip, McGee and Mitchell argued, and McGee pointed a gun at Mitchell's knee and face. When they returned to Brown's house, McGee and Mitchell continued to argue, and McGee pointed a gun toward her head and shot her. Mitchell underwent surgery to treat gunshot wounds in her

neck and back, lost the use of her legs, and required a wheelchair. She denied telling an acquaintance, Kason Lewis, that McGee accidentally shot her. Brown substantially corroborated Mitchell's account, adding that he heard McGee threaten to kill Mitchell as they walked back from the grocery store and also witnessed the shooting.

¶ 8 Chicago police officer Roger Pinel testified that he and his partner, Officer Ronald Rodriguez, responded to the shooting. At the scene, McGee told him someone was shot upstairs, and another individual told Rodriguez that McGee shot the person. The officers arrested McGee and went upstairs to find a woman sitting up on a bed and bleeding from a gunshot wound in her throat. McGee led the officers to a window and pointed out the gun, which Pinel recovered. Other police and forensic witnesses established that a gunshot residue test on McGee's hand was positive, that the gun's safety features were "in working condition," and that the gun required between 5 and 17 pounds of pressure to fire.

¶ 9 McGee denied pointing a gun at Mitchell on the walk back from the grocery store or while arguing with her at Brown's apartment. He stated the gun accidentally fired as he handed it to Mitchell, and that he tossed it out the window to prevent another accident. Lewis testified that, in July 2011, he saw Mitchell at a rehabilitation center, and she told him McGee accidentally shot her.

¶ 10 McGee was found guilty of attempt first degree murder, aggravated battery with a firearm, and aggravated domestic battery. The trial court denied McGee's motion for new trial, sentenced him to a total of 42 years' imprisonment, and denied his motion to reconsider sentence.

¶ 11 On direct appeal, McGee argued that (1) his trial counsel provided ineffective assistance by failing to impeach Brown with multiple prior inconsistent statements, and (2) the trial court improperly considered a factor inherent in his offense as an aggravating factor at sentencing. *People v. McGee*, 2014 IL App (1st) 121449-U, ¶¶ 20, 29. We affirmed. *Id.* at ¶ 36.

¶ 12 On March 10, 2016, McGee filed a postconviction petition. He alleged, in relevant part, that his counsel on direct appeal was ineffective for not raising an ineffective assistance claim against his trial counsel. In turn, his trial counsel was allegedly ineffective for not challenging the trial court's refusal to ask the venire members during *voir dire* whether they have been victims of domestic violence. McGee claimed this error denied him "the right to effectively examine the prospect jury pool to ferret out any" potential bias "that could have existed within the jury pool."

¶ 13 On June 2, 2016, the circuit court summarily dismissed McGee's postconviction petition by written order. As to McGee's ineffective assistance claim regarding *voir dire*, the court noted that McGee did not allege any specific juror was a victim of domestic violence or was biased against him. The court observed that each of the selected jurors agreed that nothing about the case would cause them to be unfair to McGee. Thus, the trial court concluded that the *voir dire* claim lacked merit, and so counsel on direct appeal was not ineffective for failing to raise it. On September 1, 2016, McGee filed a motion for leave to file a late notice of appeal, which this court granted on October 5, 2016.

¶ 14 On appeal, McGee contends that his postconviction petition stated an arguable claim that his trial counsel was ineffective for not challenging the trial court's refusal to ask the venire members whether they had been victims of domestic violence. He further maintains that he

stated an arguable claim that counsel on direct appeal was ineffective for not raising this ineffective assistance claim against trial counsel. Therefore, McGee requests that we reverse the summary dismissal of his postconviction petition and remand the case for second-stage proceedings. In response, the State argues that trial counsel acquiesced in an effective *voir dire* that removed any venire members who stated they could not decide the case fairly. Because McGee's allegations of prejudice are speculative, the State maintains that he cannot establish ineffective assistance of trial counsel or appellate counsel, and the trial court properly summarily dismissed his petition.

¶ 15 The Act (725 ILCS 5/122-1 *et seq.* (West 2016)) provides a procedure by which persons under criminal sentence in Illinois "can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both." *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). In a postconviction proceeding, issues "raised and decided on direct appeal are barred from consideration by the doctrine of *res judicata*; issues that could have been raised, but were not, are forfeited." *People v. Holman*, 2017 IL 120655, ¶ 25. At the first stage of postconviction proceedings, "[t]he allegations of the petition, taken as true and liberally construed, need only present the gist of a constitutional claim." *People v. Brown*, 236 Ill. 2d 175, 184 (2010). This standard presents a low threshold, and "[a] petitioner need present only a limited amount of detail and is not required to include legal argument or citation to legal authority." *Id.* A *pro se* defendant need only "allege enough facts to make out a claim that is arguably constitutional for purposes of invoking the Act." *Hodges*, 234 Ill. 2d at 9.

¶ 16 The Act authorizes the circuit court to summarily dismiss the petition through a written order where "the court determines the petition is frivolous or is patently without merit." 725

ILCS 5/122-2.1(a)(2) (West 2016). A *pro se* petition for postconviction relief is "frivolous or *** patently without merit" only where it "has no arguable basis either in law or in fact." (Internal quotation marks omitted.) *Hodges*, 234 Ill. 2d at 16. A petition lacks an arguable basis in law or fact where it "is based on an indisputably meritless legal theory or a fanciful factual allegation." *Id.* "An example of an indisputably meritless legal theory is one that is completely contradicted by the record," and "[f]anciful factual allegations include those that are fantastic or delusional." (Internal quotation marks omitted.) *People v. White*, 2014 IL App (1st) 130007, ¶ 18. "The summary dismissal of a postconviction petition is reviewed *de novo*." *People v. Tate*, 2012 IL 112214, ¶ 10.

¶ 17 Defendants have a constitutional right to the effective assistance of counsel at trial and on direct appeal under the United States Constitution and the Illinois Constitution. *People v. Jackson*, 205 Ill. 2d 247, 258-59 (2001); U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. 1, § 8. To prevail on an ineffective assistance claim, a defendant must establish that (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 result of the proceeding would have been different.' " *People v. Cathey*, 2012 IL 111746, ¶ 23 (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). As to the first prong, a defendant must show counsel's assistance was deficient in that " 'counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.' " *People v. Coleman*, 183 Ill. 2d 366, 397 (1998) (quoting *Strickland*, 466 U.S. at 687). As to the second prong, "[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." *People v. Enis*, 194 Ill. 2d 361, 376 (2000). At the first stage of postconviction proceedings, "a petition alleging ineffective assistance of counsel 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." *Cathey*, 2012 IL 111746, ¶ 23. "Appellate counsel is not obligated to brief every conceivable issue, and it is not incompetence to refrain from raising issues that, in counsel's judgment, are without merit, unless counsel's assessment is patently wrong." *People v. Viramontes*, 2016 IL App (1st) 160984, ¶ 72. The prejudice inquiry requires us to review the merits of the underlying issue, and "[a]ppellate counsel's choices about which issues to pursue are entitled to substantial deference." *Id.*

¶ 18 Under the United States and Illinois Constitutions, criminal defendants are guaranteed an impartial jury " 'capable and willing to decide the case solely on the evidence before it.' " *People v. Olinger*, 176 Ill. 2d 326, 353 (1997) (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982)); U.S. Const., amends. VI, IV; Ill. Const. 1970, art. 1, § 8. In furtherance of this right, "inquiry is permitted during *voir dire* to ascertain whether the juror has any bias, opinion, or prejudice that would affect or control the fair determination by him of the issues to be tried." (Internal quotation marks omitted.) *People v. Encalado*, 2018 IL 122059, ¶ 24. The purpose of *voir dire* is "to assure the selection of an impartial jury, free from bias or prejudice, and grant counsel an intelligent basis on which to exercise peremptory challenges." *People v. Dixon*, 382 Ill. App. 3d 233, 243 (2008).

¶ 19 The scope and extent of *voir dire* examination rests within the trial court's discretion. *People v. Sanders*, 238 Ill. 2d 391, 403 (2010). Illinois Supreme Court Rule 431(a) (eff. May 1,

2007) provides guidance for the exercise of this discretion, stating that "[t]he court may permit the parties to submit additional questions to it for further inquiry if it thinks they are appropriate and shall permit the parties to supplement the examination by such direct inquiry as the court deems proper ***." The trial court abuses its discretion only if it prevents the selection of a jury capable of " 'returning a verdict according to the law and evidence' " without bias or prejudice. *Dixon*, 382 Ill. App. 3d at 243 (quoting *People v. Strain*, 194 Ill. 2d 467, 476 (2000)).

¶ 20 Our supreme court in *Strain* held that "when testimony regarding gang membership and gang-related activity is to be an integral part of the defendant's trial, the defendant must be afforded an opportunity to question the prospective jurors, either directly or through questions submitted to the trial court, concerning gang bias." *Strain*, 194 Ill. 2d at 477. Nonetheless, Illinois courts have since declined to extend *Strain* and have not required trial courts to allow *voir dire* questioning on other issues, including prostitution, gun-related matters, prior convictions, and drug addiction. *Encalado*, 2018 IL 122059, ¶¶ 28-33 (prostitution); *People v. James*, 2017 IL App (1st) 143036, ¶¶ 39-40 (gun-related matters); *People v. Anderson*, 407 Ill. App. 3d 662, 682 (2011) (prior convictions); *Dixon*, 382 Ill. App. 3d at 245 (drug addiction and abuse). Notably, in *Dixon*, we recognized the *Strain* dissent's concern that " 'other litigants will now demand that jurors be questioned about an endless list of potential biases and asked to explain their reactions.' " *Id.* (quoting *Strain*, 194 Ill. 2d at 484 (Heiple, J., dissenting, joined by Bilandic, J.).

¶ 21 Here, McGee asserted in his postconviction petition that counsel on direct appeal was ineffective for failing to raise an ineffective assistance claim against trial counsel. According to McGee, trial counsel was in turn ineffective for failing to object to the trial court's decision not

to ask whether any venire members had been a "victim of domestic violence." Initially, we note that the record on direct appeal contained the transcript of *voir dire* and would have been sufficient to support the claim McGee pursues in this appeal. The issue is, therefore, forfeited since counsel on direct appeal could have raised an ineffective assistance claim on this basis. *Holman*, 2017 IL 120655, ¶ 25. Notably, counsel on direct appeal did raise a different ineffective assistance claim based on trial counsel's failure to impeach a witness (*McGee*, 2014 IL App (1st) 121449-U, ¶ 20), so we cannot assume that counsel overlooked an additional basis upon which to claim ineffective assistance. Appellate counsel was not required to raise every conceivable issue on appeal. *Viramontes*, 2016 IL App (1st) 160984, ¶ 72. Consequently, because McGee could have raised this ineffective assistance claim in his direct appeal but failed to, his attempt to do so now is barred.

¶ 22 Moreover, even if the *voir dire* issue had not been forfeited, McGee has not articulated a claim that he arguably suffered prejudice due to the alleged ineffective assistance of counsel on direct appeal, since the underlying ineffective assistance of trial counsel claim lacks merit. *Viramontes*, 2016 IL App (1st) 160984, ¶ 72. Specifically, it is clear from the record that trial counsel's performance was not deficient, as one of McGee's attorneys requested that the trial court ask the venire members whether they had been victims of domestic violence. While the trial court declined to use this specific wording and found it "too personal," the court nonetheless offered an alternative line of questioning that would elicit the same information. During *voir dire*, the trial court asked that the venire members disclose to the court in private if they "have been the victim of a crime of a very personal sort." The court additionally asked them to raise a hand if the nature of the aggravated domestic battery charge "would in any way cause [them] to

not be fair." The trial court only refrained from questioning the jury venire members in a way that would embarrass them or force them to discuss traumatic experiences in front of their peers. See *People v. Applewhite*, 2016 IL App (4th) 140558, ¶¶ 29-30, 81 (stating the trial judge properly "balanced the dignity afforded prospective jurors with regard to their reasonable expectations of privacy with the primary purpose of a *voir dire* examination," where the judge declined to specifically ask venire members whether they were victims of sexual abuse, but sought to elicit the answer through other means). Accordingly, trial counsel's actions did not fall "below an objective standard of reasonableness" simply because the two defense attorneys did not continue to dispute the trial court's specific wording of a *voir dire* question that they requested the court to ask, after the court made its decision. *Cathey*, 2012 IL 111746, ¶ 23.

¶ 23 McGee's underlying ineffective assistance of trial counsel claim also lacks merit because the trial court did not abuse its discretion in formulating the *voir dire* question at issue. It is clear from the record that the trial court's efforts effectively uncovered potential bias in the jury venire. The individual venire members were asked whether they, or any friends or family, had been victims of a crime. Two individuals disclosed close experiences with domestic violence, and another venire member disclosed that she had been the victim of armed robbery and kidnapping and could not decide the case fairly. These three individuals were excused for cause. When the trial court asked the venire members to raise a hand if they could not be fair given the nature of McGee's charges, one venire member responded affirmatively and was not placed on the jury. The trial court conducted a *voir dire* in which the jury venire was aware of the nature of McGee's charges and was asked multiple times to disclose any potential bias. *James*, 2017 IL App (1st) 143036, ¶ 40 (finding the trial court did not need to question the venire specifically

about "gun-related bias," where it gave general questions "regarding fairness and impartiality," and the venire understood the charges concerned illegal possession of a gun); *People v. Powell*, 355 Ill. App. 3d 124, 142-43 (2004) (finding the defendant, who was a gang member, failed to establish ineffective assistance where jurors stated they were able to decide the case fairly, even though they "were not asked specifically about their opinion on gangs and gang members"). These efforts successfully identified multiple venire members who disclosed they were not able to decide the case fairly, and those members were excused. The trial court did not abuse its discretion, since its *voir dire* questions did not prevent the selection of a jury capable of "returning a verdict according to the law and evidence" without bias or prejudice. (Internal quotation marks omitted.) *Dixon*, 382 Ill. App. 3d at 243.

¶ 24 Therefore, because the trial court did not abuse its discretion, and thus did not err, by declining to directly ask the venire members whether they had been victims of domestic abuse, McGee's claim that his trial counsel was ineffective for not challenging the court's formulation of the *voir dire* question must fail. *People v. Lewis*, 88 Ill. 2d 129, 156 (1981) ("Counsel is not required to make losing objections in order to provide effective representation."). By extension, because McGee cannot show that his trial counsel provided ineffective assistance, he also cannot show that his counsel on direct appeal was ineffective for not raising the ineffective assistance claim against his trial counsel. *Viramontes*, 2016 IL App (1st) 160984, ¶ 72. Accordingly, the circuit court did not err in finding that McGee's postconviction petition set forth an "indisputably meritless legal theory" with "no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 16. As such, the circuit court's summary dismissal of McGee's postconviction petition was proper.

¶ 25 Affirmed.