2019 IL App (2d) 161033-U
No. 2-16-1033
Order filed June 20, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JAMES ENNIS, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 05-CF-2041 Honorable Ronald J. White, Judge, Presiding.

PRESIDING JUSTICE BIRKETT delivered the judgment of the court.
Justice Hudson concurred in the judgment.
Justice McLaren concurred in part and dissented in part.

ORDER

¶ 1 *Held*: The trial court properly dismissed defendant's postconviction petition, which alleged that counsel was ineffective for inducing him to plead guilty to aggravated DUI instead of going to trial and challenging the State's evidence of proximate cause: given the stipulated evidence, the challenge would not have succeeded.

¶ 2 Defendant, James Ennis, appeals the second-stage dismissal of his petition filed under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2016)). He contends that his counsel was ineffective for failing to investigate, as a defense to his conviction of aggravated driving under the influence (DUI) (625 ILCS 5/11-501(d)(1)(F) (West 2004)) that his

impairment was not the proximate cause of the collision that led to the death of the victim, Ashley Simpson. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged with multiple crimes, including aggravated DUI and leaving the scene of an accident (*id.* § 11-401(b)), in connection with his involvement in a motor vehicle accident in which his vehicle struck and killed Ashley. On December 10, 2007, as part of an agreement with the State, defendant stipulated to facts in exchange for the dismissal of another charge and an agreed sentence.

¶ 5 The stipulated facts were that, on June 17, 2005, deputies from the Winnebago County Sheriff's Department were sent to the intersection of Illinois Route 251 and Copper Drive in Machesney Park because a pedestrian had been hit by a truck. Deputies found Ashley near the intersection, on the side of the road. Witnesses stated that Ashley's brother, Matthew Simpson, had crossed the highway from the west side to the east side. Ashley followed and was hit by a truck. The truck pulled over for a few seconds and then sped off north. Ashley died as a result of the injuries that she suffered from the collision. A witness stated that the truck did not brake until after hitting Ashley.

¶ 6 Deputy Roberson of the sheriff's department followed a trail of fluid just north of the intersection. The trail went to a Home Depot parking lot where a truck registered to defendant was found with extensive front-end damage. The police located defendant at his home. Defendant had a very strong odor of coffee about him. Detectives took him to the Public Safety Building for an interview. Defendant admitted to hitting Ashley and said that he left the scene because he had been drinking. Detectives interviewed defendant's girlfriend, who said that

defendant explained to her that Ashley threw her hands up at defendant and he hit her. He had consumed a few drinks, did not know what to do, and panicked.

¶ 7 Detectives interviewed employees of the White Eagle Club, who stated that defendant was at the club sometime before 6 p.m. that evening and left around 9 p.m. Defendant ordered seven to eight Budweiser Select beers while they were working. A blood test showed that defendant's blood-alcohol concentration was 0.144 grams per deciliter.

¶ 8 Before the stipulated trial, there had been evidence at a hearing on a motion to suppress that defendant initially told officers that he thought that he hit a deer and declined a Breathalyzer test until he was able to seek advice. Blood was drawn for testing approximately six hours after the accident.

¶ 9 The court admonished defendant under Illinois Supreme Court Rule 402(a) (eff. July 1, 1997) and, based on the stipulated facts, found him guilty. The court sentenced defendant to the agreed consecutive three-year terms of incarceration.

¶ 10 In December 2010, defendant filed a *pro se* postconviction petition, alleging in part that his trial counsel was ineffective for failing to provide competent advice about the proximate-cause element of DUI. He alleged that, as he was driving on Route 251, Matthew crossed in front of him and defendant swerved into the left lane to avoid him. Ashley was in the left lane, and defendant had no time to avoid her. Defendant alleged that, when he discussed his case with trial counsel, counsel highlighted the term proximate cause on a legal document and told defendant that the element needed research. However, counsel did not investigate the issue or advise him about it before trial.

¶ 11 The trial court appointed counsel who amended the petition to claim ineffective assistance for failing to investigate and provide competent advice as to the issue of proximate

cause. The petition alleged that, but for trial counsel's deficient performance, defendant would have asserted a defense.

¶ 12 The State moved to dismiss and referred to a letter written by defendant's trial counsel that included the pattern jury instruction for proximate cause and stated, "[p]lease be assured that if we believed that this definition would have been of any assistance to you, we would have advised you of that fact." That letter is not in the record and, at a later court date, the case was continued for the parties to try to find it. On November 7, 2016, without mention of the letter, the court granted the motion to dismiss. The court found that, by stipulating to the charge and facts, defendant also stipulated that proximate cause had been established. Defendant appeals.

¶ 13 II. ANALYSIS

¶ 14 Defendant contends that he made a substantial showing that his counsel was ineffective for failing to investigate the lack of proximate cause as a defense. He argues that his stipulation was tantamount to a guilty plea and that counsel's deficient representation rendered it unknowing and involuntary.

¶ 15 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2016)) provides a three-stage process for the adjudication of a postconviction petition. *People v. Johnson*, 2017 IL 120310, ¶ 14. This appeal concerns a dismissal at the second stage.

¶ 16 At the second stage, the defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). In assessing whether that burden has been met, all well-pleaded facts not positively rebutted by the trial record are taken as true. *Id.* If the court finds that the defendant has not met his burden, the petition is dismissed. *People v. Tate*, 2012 IL 112214, ¶ 10. We review *de novo* a dismissal at the second stage. *People v. Sanders*, 2016 IL 118123, ¶ 31.

¶ 17 Generally, to prevail on an ineffective-assistance claim, a defendant must show that defense counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

¶ 18 The parties agree that the stipulation in this case was tantamount to a guilty plea. See *People v. Clendenin*, 238 Ill. 2d 302, 322 (2010) (a stipulated bench trial is tantamount to a guilty plea when either (1) the defendant stipulates that the evidence is sufficient to find him guilty beyond a reasonable doubt or (2) the defendant fails to present or preserve a defense where the State's entire case against him was by the stipulation). "An attorney's conduct is deficient if the attorney failed to ensure that the defendant's guilty plea was entered voluntarily and intelligently." *People v. Hall*, 217 Ill. 2d 324, 335 (2005). "To establish the prejudice prong of an ineffective assistance of counsel claim in these circumstances, the defendant must show there is a reasonable probability that, absent counsel's errors, the defendant would have pleaded not guilty and insisted on going to trial." *Id.* "A bare allegation that the defendant would have pleaded not guilty and insisted on a trial if counsel had not been deficient is not enough to establish prejudice." *Id.* "Rather, [as pertinent here,] the defendant's claim must be accompanied by either a claim of innocence or the articulation of a plausible defense that could have been raised at trial." *Id.* at 335-36. "[T]he question of whether counsel's deficient representation caused the defendant to plead guilty depends in large part on predicting whether the defendant likely would have been successful at trial." *Id.* at 336.

¶ 19 Under section 11-501(d)(1)(F) of the Illinois Vehicle Code (625 ILCS 5/11-501(d)(1)(F) (West 2004)), a person commits aggravated DUI when, in committing a DUI offense, he is involved in an accident that results in the death of another person, when the DUI violation is a

proximate cause of the death. "Generally, a 'proximate cause' is '[a] cause that directly produces an event and without which the event would not have occurred.' " *People v. Cook*, 2011 IL App (4th) 090875, ¶ 17 (quoting Black's Law Dictionary 234 (8th ed. 2004)). "Proximate cause 'is established if an injury was foreseeable as the type of harm that a reasonable person would expect to see as a likely result of his or her conduct.' " *Id.* ¶ 18 (quoting *People v. Johnson*, 392 Ill. App. 3d 127, 131 (2009)). " 'Although the foreseeability of an injury will establish [proximate] cause, the extent of the injury or the exact way in which it occurs need not be foreseeable.' " *Id.* (quoting *Johnson*, 392 Ill. App. 3d at 131). There must be a causal link between the death and the defendant's act of DUI. See *People v. Beck*, 2017 IL App (4th) 160654, ¶¶ 150-51. But, a person commits aggravated DUI when his driving was *a* proximate cause of the death as opposed to the sole and immediate cause. *People v. Merritt*, 343 Ill. App. 3d 442, 448 (2003). The fact that the victim's actions were also a proximate cause of her death does not relieve the defendant of criminal liability. See *Beck*, 2017 IL App (4th), 160654 ¶ 151; *Merritt*, 343 Ill. App. 3d at 448.

¶ 20 Circumstantial evidence sufficient to allow a trial court to find beyond a reasonable doubt that a defendant's alcohol consumption impaired his driving ability has been found to be sufficient to prove that driving under the influence of alcohol was a proximate cause of a victim's injuries. See, *e.g.*, *Cook*, 2011 IL App (4th) 090875, ¶¶ 19-22; *Merritt*, 343 Ill. App. 3d at 448. For example, in *Cook*, a vehicle crossed into the wrong lane and caused a state trooper's vehicle, its emergency lights activated, to spin onto the shoulder of the road, leaving its front end in the roadway. The defendant, who had consumed four or five beers and at least two shots of vodka, and who had a blood-alcohol concentration of 0.109 to 0.119, struck the trooper's vehicle. There was evidence that at least one other driver slowed in anticipation of the accident

and avoided it. In discussing the sufficiency of the evidence and proximate cause, the Fourth District stressed the defendant's use of alcohol, rejecting an argument that the crash was not foreseeable. The court stated:

> "To the contrary, the dangers of drunken and drugged driving are widely familiar. See *People v. Martin*, 266 Ill. App. 3d 369, 380 (1994) ('[I]n the case of a defendant convicted of DUI, the law holds him accountable for precisely those harms actually risked by his conduct—namely, that he might seriously injure pedestrians on or next to the roadway, or that he might crash his vehicle into other vehicles on the roadway, seriously injuring their occupants. All of this is fully foreseeable, and no stretch of logic is required to view the injuries caused as those actually risked by the conduct of driving drunk.')." *Cook*, 2011 IL App (4th) 090875, ¶ 19.

The court noted that the jurors were entitled to conclude that a reasonable person in the defendant's position should have anticipated danger stemming from the defendant's intoxication, along with other factors such as other drivers leaving a bar at the same time, the time of day, the undivided, two-way traffic of the road on which the defendant traveled, and the speed limit, all of which warranted an increased awareness while driving. But, instead of driving with extraordinary caution, the defendant drove while impaired by the effects of alcohol on his perception, coordination, and reflexes. In addition, the jury could have permissibly inferred that the defendant should have been alerted to the danger when he observed the trooper's car approaching with its emergency lights activated and thus should have observed the other car cross into the wrong lane before the first collision occurred. *Id.* The court also rejected an argument that the driver swerving into the wrong lane was the cause of the accident, noting that the jury could reasonably infer that a sober driver would have reacted more appropriately to the

initial collision. *Id.* ¶ 22; see also *People v. Ikerman*, 2012 IL App (5th) 110299, ¶ 51 (sufficient evidence of proximate cause when record showed that defendant was intoxicated and failed to take evasive action before a crash); *Johnson*, 392 Ill. App. 3d at 131 (there was sufficient evidence that defendant's alcohol and cannabis consumption impaired his driving ability, thus his driving under the influence was the proximate cause of the victims' injuries).

¶ 21 Here, there was sufficient evidence that defendant's use of alcohol was a proximate cause of the victim's death. Defendant had consumed seven to eight beers before the collision and still had a blood-alcohol concentration of 0.144 grams per deciliter approximately six hours later. He also exhibited confusion or deception by initially telling officers that he thought that he hit a deer, and he exhibited knowledge of guilt by fleeing the scene and refusing a Breathalyzer. Thus, common sense would allow a jury to reasonably conclude that defendant was impaired and that the impairment was a proximate cause of the collision and the death. A reasonable jury could infer that, had he been sober, defendant would have slowed or stopped when he saw Matthew and would have avoided Ashley. Indeed, defendant admitted that he saw Ashley throw her hands up before he collided with her, but a witness stated that defendant did not even brake until after he hit her. The fact that Ashley's actions might have contributed to the collision does not change the analysis. See *Merritt*, 343 Ill. App. 3d at 448.

¶ 22 Defendant relies on *People v. Mumaugh*, 2018 IL App (3d) 140961, to argue that the facts do not support a finding that his consumption of alcohol proximately caused Ashley's death. However, that case is distinguishable. There, the defendant struck a victim who was walking in the middle of the road at night, wearing dark clothing. Meanwhile, there was no evidence that the defendant was impaired. The defendant possessed a cannabis pipe, but there was no evidence that he used cannabis on the day of the accident, he passed all field sobriety

tests, and officers found no signs of impairment. The defendant was driving below the speed limit, and there was no evidence that he was distracted or had committed any traffic violations. There was no evidence that the defendant could have avoided hitting the victim, who appeared immediately in front of his car before he hit her. Thus, there was no evidence that the defendant foreseeably caused the accident. *Id.* ¶ 32. The court distinguished the case from those such as *Cook*, *Ikerman*, and *Johnson*, in which the driver did something illegal or improper that foreseeably caused the accident. *Id.* ¶ 35 n.6.

¶ 23 Here, there was ample evidence to infer that defendant was impaired and hence did something illegal that foreseeably caused the collision. Hence, *Mumaugh* is distinguishable. Instead, cases such as *Cook*, which defendant does not cite, apply. Because defendant's alcohol consumption was a proximate cause of the collision, defendant would not have likely been successful at trial. As a result, his ineffective-assistance claim lacked merit, and the trial court correctly dismissed the petition.

¶ 24 III. CONCLUSION

¶ 25 Counsel was not ineffective for failing to challenge proximate cause. Accordingly, the judgment of the circuit court of Winnebago County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 26 Affirmed.

¶ 27 Justice McLAREN, concurring in part and dissenting in part.

¶ 28 I concur with the majority's affirmance of the trial court. However, I dissent from the assessment of the $50 appellate fee contained in section 4-2002 of the Counties Code (55 ILCS 5/4-2002 (West 2016)). In *Nicholls*, the supreme court affirmed the appellate court's assessment

of the fee against defendant Nicholls, who had appealed from the dismissal of his postconviction petition; the supreme court recognized "a legislative scheme which authorizes the assessment of State's Attorney's fees as costs in the appellate court against an unsuccessful *criminal* appellant upon affirmance of his conviction." (Emphasis added.) *Nicholls*, 71 Ill. 2d at 174.

¶ 29 However, as I have demonstrated in *People v. Knapp*, *Nicholls* was "based on the false premise that a postconviction petition is a criminal case." *Knapp*, 2019 IL App (2d) 160162, ¶ 97 (McLaren, J., dissenting). Postconviction proceedings are not criminal proceedings; they are civil, collateral proceedings. *People v. Ligon*, 239 Ill. 2d 94, 103 (2010). This well-established fact was recently reaffirmed in *People v. Johnson*, 2013 IL 114639, where all of the participants, including the State and the supreme court, recognized this fact. See, *i.e.*, *id.* at ¶ 12 ("The statutory provision that allows imposition of the $50 [*habeas corpus*] fee first appeared in the statute in a 1907 amendment, and has remained unchanged, despite the creation of *additional collateral proceedings* such as a section 2–1401 petition and a postconviction petition" (emphasis added); *Knapp*, 2016 IL App (2d) 160162, ¶ 133.

¶ 30 My dissent in *Knapp* provides a full exposition of the faulty premise of *Nicholls*, the illogic of its application to appeals from civil collateral proceedings, and the absurd results that may obtain from such application. The majority in *Knapp* declined to address *Nicholls*' faulty premise. The majority here follows suit, failing to address, let alone reconcile, the counterfactual basis underlying the *Nicholls* decision. Suffice to say, the conclusion that appellate fees are collectible in collateral civil proceedings, such as postconviction proceedings, is not based in reality. *Nicholls* has no application to civil collateral proceedings since, by its own terms, it was adjudicating *criminal* proceedings, and it has been wrongly cited as support for the assessment of

this fee for too long. As there is no basis for the assessment of the fee in this case, I dissent from its imposition.