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2019 IL App (3d) 140793-UB

Order filed February 20, 2019

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 13th Judicial Circuit, La Salle County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-14-0793
MYRON T. LESLEY,)	Circuit No. 12-CF-86
Defendant-Appellant.)	Honorable Cynthia M. Raccuglia, Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice Schmidt and Justice McDade concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not err in denying defendant's postconviction petition, which asserted a claim of ineffective assistance of plea counsel, following an evidentiary hearing because defendant failed to make a substantial showing that he was prejudiced by plea counsel's alleged deficiencies.

¶ 2 Defendant, Myron T. Lesley, appeals the denial of his postconviction petition following an evidentiary hearing. Defendant argues that the circuit court erred in applying an incorrect standard at the evidentiary hearing. We affirm.

¶ 3

I. BACKGROUND

¶ 4

On June 13, 2013, defendant pled guilty to the offenses of unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(c)(2) (West 2012)) and unlawful delivery of a controlled substance (*id.*) in exchange for consecutive sentences of five years' imprisonment and six years' imprisonment, respectively. The State also agreed to dismiss four additional charges.

¶ 5

As a factual basis for the charge of unlawful possession of a controlled substance with intent to deliver, the State indicated that police officers would testify that they arranged with a confidential informant to make an undercover purchase of cocaine from defendant. The officers recovered purported cocaine from defendant, which was sent to the crime laboratory. The State would also call a forensic scientist from the crime laboratory who would testify that the substance tested positive for cocaine and weighed 5.6 grams.

¶ 6

As a factual basis for the charge of unlawful delivery of a controlled substance, the State would call agents from a drug task force who would testify that they conducted a controlled buy in which they purchased approximately 1.5 grams of purported cocaine from defendant. The purported cocaine field-tested positive for cocaine, but the laboratory had not yet issued its report. The State indicated that plea counsel had informed defendant that if the laboratory report indicated that the substance was not cocaine or that it weighed less than one gram, defendant would be able to vacate his guilty plea.

¶ 7

On September 30, 2013, defendant filed a *pro se* postconviction petition arguing that he received ineffective assistance of plea counsel in that counsel failed to adequately investigate the case and gave him erroneous advice. The petition alleged that plea counsel failed to investigate the factual basis for defendant's arrest and whether the plea bargain had validity. Defendant also

alleged that his plea counsel pressured him into accepting a plea bargain and failed to prepare a defense. The petition also claimed that defendant's sentences "could have been ran (*sic*) concurrently *** when nothing was stated in sentencing on the reason for consecutively."

¶ 8 The State filed a motion to dismiss the postconviction petition. At a hearing the next day, the circuit court appointed the public defender to represent defendant. Eventually, the court allowed the public defender's office to withdraw because defendant had been uncooperative with his appointed attorneys.

¶ 9 On July 17, 2014, a hearing was held on the State's motion to dismiss. Defendant appeared *pro se*. The court granted the motion in part but ordered that an evidentiary hearing be held on the issue of ineffective assistance of plea counsel.

¶ 10 On the day of the evidentiary hearing, defendant filed a document titled "Motion to Supplement the Record, Post-Conviction Petition, Argument [*sic*] for Ineffective Counsel." The motion alleged, *inter alia*, that defendant's plea counsel was ineffective because the laboratory reports relating to the charge of unlawful delivery of a controlled substance were not available at the time of the plea, and, accordingly, there was not a sufficient factual basis for the plea.

¶ 11 Defendant appeared *pro se* at the evidentiary hearing. Defendant called his plea counsel as a witness. Plea counsel testified that when he was representing defendant, he reviewed the discovery and read all the police reports submitted in the case. When defendant arrived at court on June 13, 2013, plea counsel met with defendant and discussed defendant's options, the issues relating to the various charges, the potential penalties, the strength of the State's case, and the State's plea offer. Defendant told plea counsel that he wanted to plead guilty that day if he could

get the deal he wanted. Plea counsel negotiated a plea deal with the State, and defendant pled guilty that day. Plea counsel did not pressure defendant into pleading guilty.

¶ 12 Plea counsel testified that he believed he had visited defendant in jail to discuss the State's discovery, but noted that it had "been a long time." Plea counsel said that one laboratory report was available at the time of defendant's guilty plea, but one was not. Plea counsel testified that the laboratory report for the other charge was issued after the plea. The report showed that the substance tested positive for a controlled substance and weighed more than one gram. Plea counsel believed that someone had shown defendant that report. At that point, the State tendered a copy of the laboratory report to defendant. The report indicated that 1.5 grams of powder from three items had been submitted and tested positive for cocaine.

¶ 13 Defendant asked plea counsel if he saw any inconsistencies in the laboratory reports, and plea counsel said no. Regarding the charge of unlawful possession of a controlled substance with intent to deliver, plea counsel testified that the laboratory report showed that 19 items weighing 5.6 grams had been submitted to the laboratory and tested positive for cocaine. Plea counsel stated that, under the law, the crime laboratory could weigh a substance as a total only if each individual packet of the substance had tested positive for the presence of a controlled substance. Plea counsel said that nothing in the laboratory report indicated that each individual packet was not tested. Plea counsel testified that he had no basis to attack the laboratory report because it looked consistent with the police report.

¶ 14 Defendant asked plea counsel how a police officer could have testified before the grand jury that the substance weighed seven grams when the laboratory report had not been issued. Plea counsel replied that police officers testified before grand juries as to the information available to them at the time, which in this case would have been the field test and the weight of

the substance on the officer's scale. Defendant asked plea counsel how the substance could have weighed 7 grams during the field test but only 5.6 grams at the laboratory. Plea counsel said that police officers typically weigh the packaging of the substance when doing a field test but the laboratory removes the substance from the packaging before weighing it. As a result, substances often weighed more during a field test than at the laboratory. Plea counsel testified that this was not always the case, and he had occasionally seen laboratory reports indicating that a substance weighed more than the field test had shown. Plea counsel testified that the disparity in the weight of the substance between the field test and the laboratory test in this case was consistent with most reports that came from the crime laboratory.

¶ 15 Regarding the charge of unlawful delivery of a controlled substance, defendant presented plea counsel with a page from the transcript of the guilty plea hearing. Plea counsel stated that the excerpt from the transcript showed that the State had indicated at the plea hearing that an officer would testify that he purchased approximately 1.5 grams of purported cocaine from defendant. Defendant asked plea counsel how the substance could have weighed 1.5 grams during both the field test and the laboratory test if substances typically weigh less when tested at the laboratory. Plea counsel replied that substances usually weighed less when tested at the laboratory, but that did not happen all the time. Plea counsel also stated that “[d]ifferent scales will show a different weight.” Plea counsel noted that the weight of the substance given by State at the plea hearing was only an approximate weight. Plea counsel believed that it was possible for the substance to weigh 1.5 grams after laboratory testing, and he believed the laboratory report was consistent with the approximate weight given by the State.

¶ 16 Plea counsel also noted that only 3 items were submitted to the crime laboratory in relation to the charge of unlawful delivery of a controlled substance, whereas 19 items were

submitted on the charge of unlawful possession of a controlled substance with intent to deliver. Plea counsel opined that because there were 19 items submitted regarding the charge of unlawful possession with intent to deliver, there was likely significantly more packaging. Plea counsel believed that the presence of more packaging material could explain why there was a weight disparity relating to the charge of unlawful possession of a controlled substance with intent to deliver but not for the other charge.

¶ 17 After plea counsel's testimony, defendant stated that he did not want to testify. However, during defendant's argument, defendant stated that plea counsel did not visit him in jail. Defendant stated that plea counsel never showed him discovery, and defendant did not know at the time of his plea what was contained in the discovery. Defendant said that he believed that the weights shown in the laboratory reports were impossible. Defendant stated: "It's impossible for you to have this many drugs and they take some out of each individual bag and they are still the same." Defendant said that if he had seen the discovery, he would have gone to trial.

¶ 18 The circuit court denied defendant's postconviction petition following the hearing. The court stated: "I have nothing here—even if [plea counsel] did what you wanted him to do—that *** would have made you innocent at the trial if you had gone to trial." The court also stated: "[A]t this point I have to make a finding that you would have been found innocent, and I cannot show a contrary result would have happened."

¶ 19 We previously reversed and remanded on the first issue defendant raised on appeal, namely, whether the circuit court erred in forcing defendant to represent himself during the evidentiary hearing. *People v. Lesley*, 2017 IL App (3d) 140793, ¶¶ 25-26. We did not reach the second issue raised by defendant, which concerned whether the circuit court applied an incorrect standard at the evidentiary hearing. *Id.* ¶ 1. The supreme court reversed our prior opinion and

remanded the matter for us to consider the issue of whether the court applied an incorrect standard at the evidentiary hearing. *People v. Lesley*, 2018 IL 122100, ¶ 64.

¶ 20

II. ANALYSIS

¶ 21

Defendant argues that the circuit court applied an incorrect standard at the evidentiary hearing by requiring him to establish that the court would have found him innocent if the case had gone to trial. Defendant argues that because the court applied an incorrect standard, the court's denial of the petition should be vacated and the matter should be remanded for a new evidentiary hearing. The State concedes that the circuit court applied the incorrect standard but argues that we should affirm the judgment of the circuit court because the result would have been the same even if the court had applied the correct standard. We accept the State's concession that the court applied an improper standard, and we hold that defendant failed to make a substantial showing of a claim of ineffective assistance of plea counsel under the correct standard.

¶ 22

Initially, to the extent that defendant is arguing that a new evidentiary hearing is warranted merely because the circuit court applied the incorrect standard at the evidentiary hearing, we reject defendant's argument. "[W]e review the trial court's judgment, not its reasoning, and we may affirm on any grounds in the record, regardless of whether the trial court relied on those grounds or whether the trial court's reasoning was correct." *People v. Ringland*, 2015 IL App (3d) 130523, ¶ 33 (quoting *Suchy v. City of Geneva*, 2014 IL App (2d) 130367, ¶ 19).

¶ 23

At the third stage of postconviction proceedings, "the defendant bears the burden of making a substantial showing of a constitutional violation." *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). At an evidentiary hearing, "the circuit court serves as the fact finder, and, therefore,

it is the court's function to determine witness credibility, decide the weight to be given testimony and evidence, and resolve any evidentiary conflicts." *People v. Domagala*, 2013 IL 113688,

¶ 34. "At this stage, the circuit court must determine whether the evidence introduced demonstrates that the petitioner is, in fact, entitled to relief." *Id.*

¶ 24 Where a defendant asserts a claim of ineffective assistance of plea counsel, the defendant must establish that plea counsel performed deficiently and that he was prejudiced by plea counsel's deficient performance. *People v. Guzman*, 2014 IL App (3d) 090464, ¶ 32. To show prejudice in the guilty plea content, a defendant must show that "but for trial counsel's error, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial." *Id.* ¶ 33. "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." *People v. Hall*, 217 Ill. 2d 324, 335 (2005). Rather, where a defendant asserts an ineffective assistance claim related to a defense strategy or prospects for acquittal, the defendant must assert a claim of actual innocence or a plausible trial defense to establish prejudice. *People v. Brown*, 2017 IL 121681, ¶ 45.

¶ 25 Here, even if we were to accept defendant's argument that his plea counsel's performance was deficient, defendant has not shown that he was prejudiced because he has failed to assert a claim of actual innocence or articulate a plausible trial defense. Defendant contends that he has asserted a plausible trial defense in that he argued that if he had seen the laboratory report relating to the charge of unlawful delivery of a controlled substance, he would have gone to trial and challenged the weight of the item. Specifically, defendant argues that he would have challenged the weight of the item on the basis that it weighed 1.5 grams during the field test and at the crime laboratory. Defendant notes plea counsel's testimony that the item could have

weighed the same amount in its packaging during the field test and without its packaging at the laboratory because “[d]ifferent scales will show a different weight.” Defendant argues: “If counsel believed that the scale at the lab had not been properly calibrated or measured an inaccurate weight, then this would have been an area to which he could have challenged the State’s case during trial.”

¶ 26 Defendant’s proposed trial defense is not plausible based on the evidence presented at the evidentiary hearing. While plea counsel testified that different scales could show different weights, nothing in plea counsel’s testimony indicated that he believed that the scale at the laboratory had not been properly calibrated or showed an inaccurate weight. On the contrary, plea counsel testified that he believed the laboratory report showing a weight of 1.5 grams was consistent with the field test showing an approximate weight of 1.5 grams. Plea counsel emphasized that the weight of the substance at the field test was only an approximate weight. Plea counsel also stated that there was likely relatively little packaging because there were only three items submitted with regard to the charge of unlawful delivery of a controlled substance.

¶ 27 Also, defendant presented no evidence at the evidentiary hearing indicating that the scale at the laboratory was not working properly or that the weight contained in the laboratory report was inaccurate. Defendant’s proffered argument that he could challenge the weight of the substance based on the accuracy of the scale at the laboratory is based entirely on speculation. This is insufficient at the third stage of postconviction proceedings, where defendant must present evidence demonstrating that he is, in fact, entitled to relief. See *Domagala*, 2013 IL 113688, ¶ 34.

¶ 28 III. CONCLUSION

¶ 29 The judgment of the circuit court of La Salle County is affirmed.

¶ 30

Affirmed.