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2019 IL App (3d) 170089-U

Order filed May 29, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois.
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-17-0089 Circuit No. 12-CF-193
TOMMY L. CROCKWELL,	)	
Defendant-Appellant.	)	Honorable Amy Bertani-Tomczak, Judge, Presiding.

PRESIDING JUSTICE SCHMIDT delivered the judgment of the court.
Justices McDade and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: The record is incomplete or inadequate for resolving defendant's ineffective-assistance-of-counsel claim on direct appeal. The trial court erred in sentencing defendant where the oral proclamation and written order were in conflict.

¶ 2 Defendant, Tommy Crockwell Sr., appeals his conviction on two counts of first degree murder. 720 ILCS 5/9-1(a)(1) (West 2016). He asserts that he was denied effective assistance of counsel when an alibi defense was abandoned in favor of a frivolous legal argument. Defendant also argues, and the State concedes, that the trial court erred where the oral pronouncement of

defendant's sentence and the written order memorializing it were in conflict. We affirm in part, vacate in part, and correct the mittimus.

¶ 3 I. BACKGROUND

¶ 4 On October 26, 2011, just before dusk, Johnny Rouse was walking through Craig Park located in the Village of University Park. While walking through the park, Rouse was killed by a gunshot to the back of the neck. The bullet traveled in an upward trajectory, impacted the cervical vertebral column, and exited through his face. Rouse died within seconds of the gunshot. First responders found his body face down with a large amount of blood surrounding him. The same night Rouse was killed, Tommy Crockwell Jr. was shot in the hand while in Chicago. The Chicago Police Department forwarded a report to University Park police concerning this incident. University Park police interviewed Crockwell Jr. but declined to pursue him as a suspect in Rouse's death.

¶ 5 In December of 2011, Antoine Davis was working as a contractor in University Park and was told by his cousin, Mel Davis, that there had recently been a homicide in the area. Mel Davis was Chief of the University Park Police Department. Chief Davis informed Antoine that he believed Tommy Crockwell had committed the homicide without mentioning whether it was Jr. or Sr. Antoine stated he grew up with Crockwell and had been in and out of contact with him over the years. Following the conversation with Chief Davis, Antoine reached out to Crockwell Sr. During the phone conversation, Crockwell Sr. began "explaining" what had happened on the day Rouse was killed. Antoine interrupted Crockwell Sr. stating "not on the phone."

¶ 6 Antoine met with the University Park police where he learned for the first time Chief Davis believed Crockwell Jr. had committed the homicide, not Crockwell Sr. Antoine later arranged a second meeting with the University Park police and additional members of law

enforcement involved in the investigation. Antoine revealed at this meeting that Crockwell Sr. had admitted he was the shooter.

¶ 7 On January 12, 2012, Antoine, again, met with police to have eavesdropping equipment installed on his person. He then traveled to Crockwell Sr.'s home. Upon arrival, the two engaged in conversation. Crockwell Sr. admitted several times he killed Rouse and described in detail how he did so during discussions with Antoine. He noted how he disposed of the gun and that someone was driving him around while he was looking for Rouse. During the conversation, Crockwell Sr. also acknowledged that some people in the community believed his son had killed Rouse and that he was contemplating sending him to Oklahoma for a while.

¶ 8 On February 9, 2012, the State charged defendant, Tommy Crockwell Sr., by supplanting indictment with two counts of first degree murder pursuant to the Illinois Criminal Code (720 ILCS 5/9-1(a)(1) (West 2016)). One count charged that defendant committed the act with the intent to kill, while the other count charged that the act was committed with the intent to cause great bodily harm. *Id.* A jury trial ensued.

¶ 9 During opening statements, defense counsel advanced the argument that defendant confessed to the homicide in a misguided effort to counter pervasive rumors in the community that his son, Crockwell Jr., had committed the homicide. Counsel went on to state that the jury would hear from Leroy Wright. Wright was an alleged alibi witness for the defendant. Counsel claimed Wright gave defendant a ride to his home in Country Club Hills the night of Rouse's death, and defendant was at his home well before the shooting took place.

¶ 10 Before the State finished their case-in-chief but after the jury had received two days of testimony, defendant decided to waive the jury on advice of counsel. Defense counsel explained to the court:

> "I've had an opportunity to have conversations with my client, and having thought about this at least now for the last 15 hours, and in those discussions that I had—I won't give you the contents of them, [Y]our Honor—Mr. Crockwell and I have talked about this. And it is Mr. Crockwell's decision, based on my advice—I want the record to reflect this is my advice. While we don't like doing this, [Y]our Honor, we are going to ask [Y]our Honor to allow him to waive the jury and proceed with a bench trial in this matter. We do not like to waste time. Having gone through the evidence and seeing where the evidence is, I have spoken with him about where we are in this. We would ask to file a motion to waive the jury, [Y]our Honor, and continue with a bench trial, which I believe is his right."

Defendant was admonished by the trial court as to the waiver of the jury and the proceedings continued via a bench trial.

¶ 11 Once the State rested, defendant moved for a directed finding but asked to reserve argument until closing statements. The court concluded proceedings for the day and reconvened the following Monday. Defense counsel, at this point, stated that he was not going to put on a defense and the exchange below followed:

> "MR. ADAM [(DEFENSE COUNSEL)]: Again, I apologize to the Court.
>
> THE COURT: That's all right. The State had rested. You had your case today, if you have one.

> MR. ADAM: After speaking to my client, we do not wish to present any evidence and the defendant does not wish to testify. We would ask [Y]our Honor inquire.
>
> THE COURT: Originally you had something about an alibi.
>
> MR. ADAM: That is correct, [Y]our Honor.
>
> THE COURT: Going by your opening statement.
>
> MR. ADAM: That is correct, [Y]our Honor. We do not wish[,] and I have spoken with Mr. Crockwell regarding this, of putting [*sic*] forward any evidence. We believe—in my closing argument I believe that we can show [Y]our Honor that the State has not proven their case beyond a reasonable doubt. Based on that, [Y]our Honor, we do not wish to put on any further evidence."

Wright, the alleged alibi witness, did not testify.

¶ 12 During closing statements defense counsel presented to the court a defense based on the theory of *corpus delicti*. Counsel asserted, "[t]he law in the State of Illinois is very clear, *which is one of the reasons* why we came back and went—we talked to Tommy and waived the jury when we saw what the State had put forward." (Emphasis added). Counsel went on to claim, "[t]he law in the State of Illinois is exceptionally clear that a person cannot legally be found guilty on his statement alone." Counsel asserted that *People v. Sargent*, 239 Ill. 2d 166 (2010), *People v. Harris*, 2012 IL App (1st) 100077, and *People v. Rivera*, 2011 IL App (2d) 091060, supported the proffered *corpus delicti* defense. The gist of the argument presented was that when a

defendant's extrajudicial confession is part of the proof of the *corpus delicti*, the prosecution must adduce corroborating evidence independent of the defendant's own statement and that the State had failed to do so in this case. The State rebutted counsel's argument by pointing out that there was sufficient corroborating evidence in the case that a crime had occurred.

¶ 13 Following argument, the trial court denied defendant's motion for directed verdict, but held the verdict under advisement until November 8, 2016, when it found defendant guilty of both counts charged. Defense counsel filed a motion for new trial the same day in which he renewed, *inter alia*, the *corpus delicti* argument. The trial court denied the motion and proceeded to sentencing. Defendant was sentenced to 50 years' incarceration with a 3-year term of mandatory supervised release. The trial court's oral pronouncement was that the two counts would merge but on February 3, 2017, the court entered an order imposing concurrent sentences on both counts. The court, in its order, listed count I as a violation of section 9-1(a)(1) of the Code (720 ILCS 5/9-1(a)(1) West 2016)) and count II as a violation of section 9-1(a)(2) (*id.* § 9-1(a)(2)).

¶ 14 Defendant appealed.

¶ 15 II. ANALYSIS

¶ 16 A. Ineffective Assistance of Counsel

¶ 17 Defendant argues he was provided ineffective assistance of counsel when counsel abandoned an alibi defense in favor of the frivolous *corpus delicti* argument. The State argues the record is insufficient to fully analyze defendant's assertion and collateral review is appropriate. Alternatively, the State argues defendant's argument is barred by the doctrine of invited error.

¶ 18 Every defendant has a constitutional right to the effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. Ineffective assistance of counsel claims are reviewed under the standard provided in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Manning*, 241 Ill. 2d 319, 326 (2011). To establish ineffective assistance of counsel, defendant must show: (1) his counsel's representation fell below an objective standard of reasonableness and (2) that the substandard representation prejudiced the defendant. *Strickland*, 466 U.S. at 687; *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984) (adopting *Strickland*). "A reviewing court may reject a claim of ineffective assistance of counsel by finding that petitioner was not prejudiced by counsel's representation without determining whether counsel's performance was deficient." *People v. Cloutier*, 191 Ill. 2d 392, 398 (2000) (citing *People v. Erickson*, 161 Ill. 2d 82, 90 (1994)).

¶ 19 We note that the core issue here is whether counsel was ineffective for failing to call an alleged alibi witness. Decisions concerning what evidence to present are matters of trial strategy and are generally immune from claims of ineffective assistance of counsel. *People v. West*, 187 Ill. 2d 418 (1999). A defendant must overcome a strong presumption that counsel's actions or inactions were the result of sound trial strategy. *People v. Houston*, 226 Ill. 2d 135 (2007).

¶ 20 Defendant contends it is clear from the record that the reason counsel did not call the alibi witness in the underlying case was because of the misconceived *corpus delicti* argument. We disagree, as it is not clear from the record this was the case. Defendant cites to *People v. King*, 316 Ill. App. 3d 901 (2000), to support his argument. However, the defendant in *King* had already been denied relief in his direct appeal and only obtained a new trial on the basis of ineffective assistance of counsel after a record was developed in postconviction proceedings. *Id.* at 903-04, 919. The reviewing court in *King* had the benefit of an affidavit from the alibi witness.

Id. The affidavit contained testimony that would have been "unequivocally exculpatory." *Id.* at 914. We are provided with no such record in this case. Additionally, the reviewing court in *King* found that the evidence supporting the conviction was less than overwhelming (*id.* at 919); there is a recorded confession in this case. Defendant also relies on *People v. Tate*, 305 Ill. App. 3d 607 (1999). The reviewing court in *Tate* also had the benefit of affidavits from alleged alibi witnesses attached to a postconviction petition. *Id.* at 610. The appellate court in *Tate* reversed the dismissal of the petition at the first stage of proceedings. *Id.* at 613. In doing so, the court opined on the ineffective assistance of counsel claim stating, "[o]nce evidence is heard on the issue, the circuit court will be in a better position to determine whether defendant received ineffective assistance of counsel." *Id.* at 612. Again, this is not the situation we are faced with here.

¶ 21 After reviewing the record, defense counsel's reasoning as to why he did not call the alleged alibi witness is far from clear. We disagree with defendant that *King* and *Tate* are applicable to this case. We are not privy to the conversations that resulted in defendant failing to call Wright to testify. The record presented in this case is inadequate to resolve defendant's claims. Counsel, in waiving the jury, made clear that his interpretation of the law was only one of the reasons for doing so in preparation of presenting his legal argument. This leads to the obvious inference that there were other reasons of which we are not aware that led to the defense not calling Wright to testify. Counsel, in advancing the suspect *corpus delicti* argument, could simply have been trying to make the best of a bad situation where he faced a recorded confession, an alibi witness with no alibi, and no evidence to put on in rebuttal to the State's case. This, of course, is conjecture because we do not know. The State engages in similar conjecture in its brief and lays out a plethora of possibilities as to why Wright was not called to

testify. The most notable theory the State advances is that in his confession, defendant claims that an accomplice was driving him around looking for Rouse. From what is apparent in the record, it appears the alibi witness was going to testify that he was driving defendant home that evening and was playing video games and smoking cannabis when the murder occurred. Having an alibi witness testify that he was driving defendant around when defendant confessed someone was driving him around looking for Rouse could have been reason enough not to put Wright on the stand. The alibi witness himself may have realized this and decided not to testify. There are too many unknowns for this court to engage in a meaningful review. A direct appeal of defendant's conviction is not the appropriate vehicle for his claim. Thus, defendant's claims are better suited for postconviction proceedings where a sufficient record can be developed regarding counsel's reasoning and Wright's testimony.

¶ 22 The Illinois Supreme Court has addressed the appropriateness of reviewing courts declining to consider certain ineffective assistance of counsel claims on direct appeal. See *People v. Veach*, 2017 IL 120649, ¶¶ 31, 39. The court asserted 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" and instructed reviewing courts to "carefully consider each ineffective assistance of counsel claim on a case-by-case basis" to determine if the circumstances permit an adequate review of defendant's ineffective assistance of counsel claim on direct appeal. *Id.* ¶¶ 46, 48; see also *People v. Bew*, 228 Ill. 2d 122, 134-35 (2008); *Massaro v. United States*, 538 U.S. 500, 504-05 (2003). In the matter before us, it is apparent that meaningful review of defendant's claim cannot be engaged without a supplemented record.

¶ 23 We turn briefly to the State's invited error argument. The State argues that defendant knowingly waived his right to a jury trial and the record contains admonishments from the trial

court and acknowledgements of discussion with counsel on the issue. "Under the doctrine of invited error, an accused may not request to proceed in one manner and then later contend on appeal that the course of action was in error." *People v. Carter*, 208 Ill. 2d 309, 319 (2003). The State, in advancing this argument, apparently misperceived the crux of defendant's claim on direct appeal. While the State squarely focuses this argument on defendant's jury waiver in connection with the ineffective assistance of counsel claim, defendant's claim is juxtaposed on the argument that counsel should have called the alleged alibi witness to testify. The State then goes on to cite a case that is factually inapposite to the case at bar. In missing the point the State has missed the mark and the argument that defendant invited this error is without merit.

¶ 24 B. Sentencing Order

¶ 25 Defendant also argues the sentencing order differs from the oral pronouncement made by the circuit court. Defendant asks that we remand or, in the alternative, amend the mittimus to reflect the correct judgment. The State concedes the oral pronouncement and the written order are in conflict but asserts we should exercise our power pursuant to Illinois Supreme Court Rule 615(b)(1) to amend the mittimus.

¶ 26 While the written order of the circuit court is evidence of the judgment of the circuit court, the trial judge's oral pronouncement is the judgment of the court. *People v. Carlisle*, 2015 IL App (1st) 131144, ¶ 87. When the oral pronouncement of the court and the written order are conflicting, the oral pronouncement controls. *People v. Smith*, 242 Ill. App. 3d 399, 402 (1993). The question of whether defendant's mittimus should be corrected is a purely legal issue, subject to *de novo* review. *People v. Jones*, 397 Ill. App. 3d 651, 656 (2009). This court has the authority to order the clerk of the circuit court to issue a corrected mittimus. See Ill. S. Ct. R. 615(b)(1); see also *People v. Lewis*, 2012 IL App (1st) 102089, ¶ 23.

¶ 27 The circuit court, in its oral proclamation, stated the two counts would merge but the court entered an order imposing concurrent sentences on both counts and listing count II as a violation of section 9-1(a)(2), which differs from the counts brought in the charging instrument. 720 ILCS 5/9-1(a)(1) (West 2016). The only issue if we were to amend the mittimus, is which count would the sentence be imposed upon. Count I alleged defendant committed the murder with the intent to kill, while count II alleges defendant committed the murder with the intent to cause great bodily harm. Defendant claims that the charges in the separate counts "are virtually identical" and the more serious charge cannot be identified. We disagree.

¶ 28 Pursuant to the one-act, one-crime doctrine, a reviewing court must vacate the less serious offense, which is determined by comparing the relevant punishments for the offenses. *People v. Artis*, 232 Ill. 2d 156 (2009). However, where punishments are identical, reviewing courts must consider which offense requires the more culpable mental state, which we review *de novo*. *In re Samantha V.*, 234 Ill. 2d 359 (2009). Where a reviewing court cannot determine which offense is more serious, the cause should be remanded for the trial court to determine which conviction should be vacated. *Artis*, 232 Ill. 2d 156.

¶ 29 While both convictions require the same mental state of "intent," one requires the intent to kill while the other requires the intent to cause great bodily harm. Our supreme court in *Samantha V.* stated, "[w]e conclude that the better course is to continue to adhere to the principle that when it cannot be determined which of two or more convictions based on a single physical act is the more serious offense, the cause will be remanded to the trial court for that determination." *Samantha V.*, 234 Ill. 2d at 380. We believe the conclusion in this case to be logical. A conviction based on the intent to kill is the more serious offense when compared to a

conviction resting on the intent to cause great bodily harm. Therefore, defendant's conviction and sentence for count II is vacated.

¶ 30 CONCLUSION

¶ 31 For the foregoing reasons, we affirm defendant's conviction and sentence for first degree murder with the intent to kill, but vacate defendant's conviction and sentence for first degree murder with the intent to cause great bodily harm. We direct the clerk of the circuit court to correct the mittimus to reflect our decision.

¶ 32 Affirmed in part and vacated in part; mittimus corrected.