2019 IL App (3d) 170312-U

Order filed July 22, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 21st Judicial Circuit, Iroquois County, Illinois.
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-17-0312 Circuit No. 16-CF-46
CHAD A. WALWER,	)	
Defendant-Appellant.	)	Honorable James B. Kinzer, Judge, Presiding.

PRESIDING JUSTICE SCHMIDT delivered the judgment of the court.
Justices Carter and Holdridge concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant cannot show that he suffered prejudice sufficient to prevail on any of his four claims of ineffective assistance of counsel.

¶ 2 Defendant, Chad A. Walwer, appeals from his conviction for possessing contraband in a penal institution. Defendant argues trial counsel provided ineffective assistance, and the cause should be remanded for further proceedings on defendant's posttrial claim of ineffective assistance of counsel. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The State charged defendant by information with one count of possessing contraband in a penal institution (720 ILCS 5/31A-1.1(b) (West 2016)). Before trial, defendant made an oral motion *in limine* to bar the State from admitting a handwritten anonymous note found in the Iroquois County jail. The note started an investigation that led to the instant charge. The note is dated April 27, 2016, and states:

> "Joe,
>
> Chad is slipping Heroin to Ronnie threw [*sic*] the Law Books. Hope this counts for something man. I told them to throw it away. He says fuck that. I hope this will count for something. Then hopefully Josh will be up to talk with me."

The State said that if the court allowed it to reference the note, then it would not publish the note to the jury. In its ruling, the court said if correctional officer Kellee Ward mentioned the note during her testimony, it would instruct the jury that it was not to consider the note as evidence of defendant's guilt. On March 16, 2017, the case proceeded to a jury trial.

¶ 5 The State called Crystal Cavazos as its first witness. Cavazos had known defendant since she was approximately 9 or 10 years old. Following defendant's arrest, Cavazos frequently visited defendant at the Iroquois County jail. At the time, Cavazos had a romantic relationship with defendant and she lived in defendant's home. On April 26, 2016, Cavazos purchased a package of four white shirts from Walmart. She took the shirts to defendant's residence, unsewed the collar of each of the shirts, inserted a pea-sized package of heroin, and then sewed the collar shut. Later, Cavazos brought the four shirts, along with other clothing, to the jail for defendant.

¶ 6 On cross-examination, Cavazos said that she had used heroin in the past and quit consuming it approximately eight or nine months before the trial. Cavazos had also used cocaine

several months prior to the trial, and smoked marijuana four or five days before the trial. The State had charged Cavazos with bringing heroin into a penal institution, but it gave her immunity from prosecution in exchange for her testimony against defendant. Cavazos said that she had initially lied to the police when she told an investigator that she did not know there was heroin in the shirts, but she was testifying truthfully.

¶ 7 Correctional officer Ward testified that on April 27, 2016, she found an anonymous note on a meal tray retrieved from the lower west side of the jail. The note said that defendant "was trying to pass heroin *** to the other side through the law book." While reading the note, Ronnie Turner, an inmate on the east side of the jail yelled for the law book, and an inmate on the west side of the jail asked Ward to pass the book to the inmate on the east side. Ward said the request "caught [her] attention a little bit because they were really, really wanting [the book]." At the time of the request, defendant was housed on the lower west side of the jail. After reading the note, Ward retrieved the law book from a chuck hole in the door of the lower west unit. Ward did not know who placed the book in the chuck hole, but noted that defendant was housed in that unit. Ward found a folded up piece of paper in the law book that contained a brown powdery substance. While Ward investigated the book, Turner yelled that he needed the book "right away" and asked why Ward was not giving him the book. Turner continued yelling for the book for about 10 minutes.

¶ 8 On cross-examination, Ward said that she did not see defendant handle the law book, and she never learned who wrote the note. Ward explained that on April 27, only inmates housed in the lower west unit had access to the law book that contained the contraband. However, she noted that the substance could have been placed in the book the day before her discovery, and she did not know for certain "how many hands" went through the book that day. Defense counsel

asked Ward to look at a copy of the note, and asked Ward to read the contents of the note. Ward read

> "It says 4/27/16 Joe, Chad is slipping heroin to Ronnie through the law books. Hope this counts for something man. I told them—I told them to throw it away. He says fuck I hope this will count for something then hopefully Josh will be up to talk to with me."

Ward assumed that the note was addressed to correctional officer Joseph Jaskula.

¶ 9 Jaskula testified that on April 27, 2016, he and Ward found a note in front of the door to the lower west unit. The note indicated that there was heroin located in a law book. Ward retrieved the law book from the chuck hole. Jaskula was present when Ward found the brown powdery substance in the law book. Around 8:30 a.m., Jaskula gave the substance to Sergeant Eric Starkey. On cross-examination, Jaskula said that the note was addressed to him, and he did not know who wrote the note.

¶ 10 Correctional officer Shon Johnson testified that on April 26, 2016, around 10 p.m., Cavazos dropped off four white shirts, three pairs of underwear, and three pairs of white socks for defendant. Johnson took the clothing, and Cavazos left the jail. Johnson said that Cavazos was a "known visitor" for defendant, and while he did not recall if Cavazos said the clothing was for defendant, he marked the clothing with defendant's initials. Johnson conducted a cursory inspection of the shirts and observed that they were "brand new." Johnson placed the fourth shirt in a secure locker as the inmates were only allowed to have three shirts at a time. A correctional officer gave defendant the shirts around 10:30 p.m. On April 27, 2016, defendant attempted to trade a shirt for the fourth shirt that was secured in the locker. Johnson inspected the fourth shirt and noticed a small gray packet sewn into the collar.

¶ 11 Correctional officer Claudio Garcia testified that on the morning of April 27, 2016, defendant asked Garcia to exchange one of his white shirts for the shirt that was in defendant's locker. Garcia took a white shirt from defendant and noticed that the shirt had a small tear in the collar. At the time, he knew of the allegations that contraband had been smuggled into the jail. Garcia did not locate defendant's other two shirts and the correctional officers did not conduct a search of defendant's jail cell.

¶ 12 Sergeant Starkey of the Iroquois County Sheriff's Department testified that on April 27, 2016, members of the jail staff turned over a brown powdery substance that had been found in a folded piece of paper concealed in a book. Starkey also collected two shirts from the correctional officers. Starkey noticed that the collar on one of the shirts had been ripped, and the second shirt, which came from a secured locker, had a small plastic bag sewn into the collar. The bag contained a brown powdery substance that was later identified as heroin.

¶ 13 The day after the discovery of the heroin, Starkey arrested Cavazos and interviewed defendant. During the interview, Starkey told defendant that he had taken Cavazos into custody. Defendant said he had no knowledge of how the heroin got into the jail. Defendant told Starkey "when he had gotten one of the shirts on that he had felt something on his neck line and that when he had felt the back of the shirt he had discovered the substance inside the collar." Defendant did not notify any of the correctional officers of the substance. On cross-examination, Starkey said that his police report stated that Ward had received a note from inmate Matthew Eli Conley.

¶ 14 Illinois State Police forensic chemist Pamela Wilson testified that she analyzed two samples of a brown powdery substance discovered in the Iroquois County jail. Wilson determined that both of the samples contained heroin.

¶ 15 Defendant testified that Cavazos was his former girlfriend and together they had a six-month-old child. Defendant had a "couple prior felonies" including a 2009 "gun charge," a 2007 "burglary case," and a 2005 "theft case."

¶ 16 On April 22, 2016, police officers arrested defendant and transported him to the Iroquois County jail. Around 10:20 p.m. on April 26, 2016, defendant and Conley were involved in a physical altercation. During the altercation, Conley ripped defendant's shirt. On the morning of April 27, 2016, defendant asked Garcia for a new shirt. Garcia took defendant's ripped shirt and returned with an older shirt. When defendant asked about the new shirts that Johnson had previously told him about, Garcia took the older shirt and later escorted defendant to speak with Starkey. Starkey told defendant that the police had taken Cavazos into custody on charges of bringing contraband into a penal institution. Starkey indicated to defendant that he could "save" Cavazos by cooperating with the investigation. Defendant said that he knew nothing about the contraband, and he would have known if something was concealed in his shirts as his anxiety condition caused him to feel around his neck. Defendant said that the correctional officers did not conduct a search of his cell before or after he spoke to Starkey, and he was never required to take a drug test. Defendant testified that he did not have contact with the heroin or the law book on April 26 and 27. Defendant also had not spoken to Cavazos before she dropped off the shirts.

¶ 17 The State's cross-examination of defendant began with the following exchange.

> "Q. So, [defendant], you want this jury to believe everything that you are saying here today; is that correct?
>
> A. Yes, sir.
>
> Q. And you want this jury to believe you are a truthful person?
>
> A. Yes, sir.

Q. And you want this jury to believe that you never possessed heroin in that jail?

A. Never did I possess anything.

Q. Anything?

A. Never did I possess anything in the jail.

Q. Meaning heroin?

A. Meaning heroin.

Q. Or any other illegal substance?

A. Or any other illegal substance.

Q. The fact that you've been convicted of a felony theft in 2005; correct?

A. Yes, sir.

Q. And you've been convicted of residential burglary in 2005?

A. Yes, sir.

Q. And you've been convicted as a felon in possession of a firearm in 2009?

A. Yes, sir.

Q. And despite these felony convictions you want this jury to believe everything you are saying today?

A. Yes, sir.

Q. You had a conversation with Investigator Starkey in his office, didn't you?

A. Yes, sir.

Q. And you are telling Investigator Starkey that you had a scratch in your neck and that you noticed a little lump in your collar?

A. That is not what I told him—Investigator Starkey.

Q. You didn't tell him that?

A. No.

Q. So when Investigator Starkey testified about that yesterday he was lying, is that what you are saying?

A. Yes, sir.

Q. So Investigator Starkey is a liar according to you?

A. Yes, sir.

Q. Is that what you are saying?

A. That's not what was said between him and Investigator Starkey.

Q. So Investigator Starkey if he said that is a liar?

A. Yes, sir.

Q. Okay. So when Corrections Officer Johnson told this jury that the night of April 26th when Crystal Cavazos brought in those 4 t-shirts to give to you and Officer Johnson said that he gave those shirts to you that night, that was a lie, wasn't it?

A. What? Johnson giving me t-shirts?

Q. Yes, the night of April 26?

A. Yes, Officer Johnson did give me t-shirts.

Q. He gave you 3 t-shirts, didn't he?

A. Yes, but also—

Q. He gave you 3 t-shirts and you just testified earlier you already had 3 t-shirts in your cell, didn't you?

A. Yes, sir.

Q. So you didn't know why Crystal would be bringing you new t-shirts when you already had 3 t-shirts in your cell; is that correct?

A. Yes, sir.

Q. In fact, so at one time really you had 6 t-shirts in your cell?

A. Yes, sir.

Q. Okay. So Officer Johnson was telling the truth then when he said he got these 4 t-shirts from Crystal and he gave 3 of them to you that night. That was true?

A. Officer Johnson said he assumes the t-shirts were for me because me and Crystal were boyfriend and girlfriend at the time.

Q. Now, Officer Johnson testified he gave 3 t-shirts to you the night of April 26?

A. Yes, he said he assumed they were for me.

Q. No, he said that he gave them to you, [defendant].

A. He said he assumed they were for me.

Q. No, he—

[DEFENSE COUNSEL]: Argumentative.

THE COURT: [Defendant], just answer [the State's] question yes or no.

[DEFENDANT]: Yes.

By [THE STATE]:

Q. So is Mr. Johnson lying?

A. Officer Johnson gave me 3 t-shirts.

Q. Okay. So we are no longer assuming that. It is a fact he gave you 3 t-shirts the night of April 26?

A. Yes, sir.

Q. Okay. Glad to clear that. So the 4th t-shirt you knew was in your locker because Officer Johnson told you that?

A. Officer Johnson said there was 4 t-shirts brought out and I could only have 3.

Q. So that 4th t-shirt you knew was in your locker that they keep for you for your personal belongings?

A. For when you want to exchange it out.

Q. Right. So you knew there was a 4th t-shirt in your locker?

A. Yes.

Q. That Crystal had brought?

A. Yes.

Q. Because she brought it out the night of the 26th?

A. Yes.

Q. Okay. So when Crystal testifies that she sewed heroin into your collar of your t-shirts that was a lie?

A. Crystal was saving her own butt by saying that.

Q. Okay. So she's lying that she sewed heroin into your t-shirts?

A. I don't know how many t-shirts she sewed anything into besides the one that was in the locker that was found.

Q. Oh, so the 3 t-shirts that you received didn't have anything sewn into the collars? Is that what you are saying?

A. No, sir.

Q. And the heroin then that was found in the law book didn't come from one of those t-shirts that were delivered to you the night of the 26th; is that correct?

A. No, sir.

Q. So that heroin had just randomly appeared from somebody?

A. There's a block full of ten inmates.

Q. Could have been anyone of them then, right?

A. Yes, sir.

Q. But that law book came from the cell block that you occupied; correct?

A. The law book came from the lower east to the lower west that day and then back to the lower east the next morning.

Q. So on the day of the 26th, the night that Crystal delivered these shirts to you, the law book was in your cell?

A. The law book had got passed by her brother Ronnie Turner to the lower west.

Q. You were in the lower west; correct?

A. I was on the lower west, but it got passed to Mr. Conley, which they write on the board who the book goes to."

Defendant also said that he had used heroin in the past and described it as a brown powdery substance. Defendant had consumed heroin by inhaling the powder through his nose and injecting it into his veins. Defendant had also witnessed Cavazos use heroin.

¶ 18 At the conclusion of defendant's testimony, the defense moved to admit, and the court admitted into evidence, a copy of the note discovered in the jail.

¶ 19 Before deliberations, the court instructed the jury, in part, that

"Only you are the judges of the believability of the witnesses and of the weight to be given to the testimony of each of you. In considering the testimony of any witness you may take into account his or her ability and opportunity to observe, his or her memory, his or her manner while testifying, any interest, bias or prejudice he or she may have and the reasonableness of his or her testimony considered in light of all of the evidence in the case."

¶ 20 During deliberations, the jury asked to see the "ripped shirts." Defense counsel noted that there was only one ripped shirt, and the parties agreed to send that shirt to the jury room. Thereafter, the jury found defendant guilty of possessing contraband in a penal institution.

¶ 21 The cause proceeded to a joint sentencing hearing with case Nos. 16-CF-37 and 16-CF-71. During his statement in allocution, defendant said

> "And the whole time I thought everything was going to be ran concurrent. I was told that the whole time. Not one time did somebody tell me, Chad, these are consecutive from both sides. From both sides I've gotten plea agreements of them ran concurrent. If I would have known any of this I would have took the 7 years ran concurrent that they offered me two months ago. Three months ago. I would have took the 7 just to go."

The court sentenced defendant to 20 years' imprisonment and ordered the sentence to run consecutive to the 4 and 5-year concurrent sentences that it imposed in case Nos. 16-CF-37 and 16-CF-71. Defendant appeals.

¶ 22 II. ANALYSIS

¶ 23 A. Ineffective Assistance of Trial Counsel

¶ 24 Defendant argues trial counsel provided ineffective assistance where he (1) failed to request an accomplice-witness instruction, (2) did not object to the State's improper impeachment with his prior felony convictions on cross-examination, (3) failed to object to the introduction of hearsay evidence that showed that defendant was delivering heroin and then sought to admit that evidence as substantive evidence, and (4) failed to object when the State asked defendant whether other witnesses were lying. Upon review of the record, we find that defendant cannot establish the prejudice prong of the ineffective assistance of counsel analysis.

¶ 25 To establish a claim of ineffective assistance of counsel, defendant "must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Petrenko*, 237 Ill. 2d 490, 496 (2010) (citing *Strickland v. Washington*, 466

U.S. 668, 687 (1984)). Since defendant must establish both prongs of the *Strickland* test, we need not consider defendant's allegations of deficient performance if defendant cannot show that he suffered prejudice. *Strickland*, 466 U.S. at 694. "A defendant establishes prejudice by showing that, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different." *People v. Houston*, 229 Ill. 2d 1, 4 (2008). A "reasonable probability" is defined as a probability that would be sufficient to undermine confidence in the outcome of the trial. *Id.*

¶ 26 We find that the strength of the State's case, even excluding counsel's allegedly deficient actions, prevents defendant from establishing the prejudice prong of the *Strickland* analysis.

¶ 27 To secure defendant's conviction of possessing contraband in a penal institution, the State needed to prove that defendant knowingly possessed contraband in the Iroquois County jail. See 720 ILCS 5/31A-1.1(b) (West 2016). The parties do not dispute that on April 26 and 27, 2016, defendant was incarcerated in the Iroquois County jail. Defendant's then girlfriend, Cavazos, testified that she brought clothing to the jail for defendant. Cavazos concealed heroin in the collars of four of the white shirts included with the clothing. Correctional officer Johnson received the shirts from Cavazos whom he knew as one of defendant's "known" visitors, marked the shirts with defendant's initials, placed one in defendant's locker, and had the other three shirts delivered to defendant. According to correctional officer Garcia, on the morning of April 27, 2016, defendant asked to exchange a shirt for the fourth shirt that was secured in the locker. Garcia observed that the collar on the shirt that defendant handed him was torn. Johnson subsequently found a package of heroin in the collar of the fourth shirt that was located in the locker. Investigator Starkey's testimony established that the torn shirt had also contained heroin, similar to the shirt in the locker, and defendant told him that he discovered contraband in the

collar of the shirt. Ward discovered additional heroin in law book that was removed from the unit where defendant was housed. Only defendant's testimony rebutted this evidence. Defendant claimed that he had not found anything concealed in his shirt collar, Starkey's statement was false, and Cavazos had lied in order to save herself. However, defendant's testimony is refuted by the consistent and corroborated evidence put forth by the State that established that Cavazos brought four shirts to the jail for defendant, the shirts contained heroin concealed in the collars, the heroin was removed from the collar of a shirt in defendant's possession (as indicated by the ripped collar), and defendant's request for the fourth shirt by exchanging the ripped shirt was indicative of his knowledge of the contraband concealed in the collars. Given this evidence, the four deficiencies alleged by defendant do not possess a reasonable probability of altering the outcome of the trial.

¶ 28 Examining the alleged deficiencies in isolation, we find that defendant cannot show prejudice resulted from counsel's alleged errors. First, defendant suffered no prejudice as a result of counsel's failure to request an accomplice-witness instruction as the court instructed the jury to consider the "bias or prejudice [each witness] may have and the reasonableness of his or her testimony considered in light of all of the evidence in the case." See *People v. Lewis*, 240 Ill. App. 3d 463, 467 (1992) (error in not requesting an accomplice-witness jury instruction, alone, did not require reversal where the court instructed the jury that in determining credibility of witnesses, they should consider any interest, bias or prejudice). Second, the State's cross-examination questions about defendant's prior convictions did not harm defendant's credibility as it merely recited the three convictions that defendant had mentioned in his direct examination. Moreover, the facts of the case necessarily required that the jury have some familiarity with defendant's criminal history as he was incarcerated at the time of the instant offense. Third, the

exclusion of the note found in the jail on hearsay grounds would not have altered the outcome of the case as the State needed only to show that defendant possessed the heroin, and the circumstantial evidence of the ripped shirt in defendant's possession and the heroin concealed in the collar of defendant's fourth shirt, along with Starkey's testimony clearly established this element. 720 ILCS 5/31A-1.1(b) (West 2016). Finally, the State's cross-examination questions that asked defendant whether several of the State's witnesses testified falsely caused defendant no prejudice as it afforded defendant an opportunity to directly comment on the credibility of the witnesses and refute their testimony. Accordingly, we conclude that defendant cannot show that he suffered prejudice as a result of counsel's allegedly deficient performance, and therefore, he has not shown that he received ineffective assistance of counsel.

¶ 29 B. Posttrial Allegation of Ineffective Assistance

¶ 30 Defendant argues that the cause must be remanded for the circuit court to address his posttrial allegation of ineffective assistance of counsel. Defendant claims his presentence statement that no one told him that he would be subject to consecutive sentencing constituted a *pro se* assertion of ineffective assistance of counsel. We find that defendant's statement was not a posttrial claim of ineffective assistance of counsel, and therefore, it does not warrant a remand for *Krankel* proceedings.

¶ 31 When a defendant makes a posttrial claim of ineffective assistance of counsel, the circuit court must conduct a preliminary hearing to determine if the claim shows possible neglect of the case and new counsel needs to be appointed to further develop defendant's claim. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). In order to trigger this preliminary inquiry, a defendant must make a "clear claim asserting ineffective assistance of counsel, either orally or in writing." *People v. Ayres*, 2017 IL 120071, ¶ 18. For example, a defendant's use of the words "ineffective

assistance of counsel," with no explanation or supporting facts, is sufficient to trigger the posttrial ineffective assistance inquiry prescribed by *People v. Krankel*, 102 Ill. 2d 181 (1984), and its progeny. *Ayers*, 2017 IL 120071, ¶ 24.

¶ 32 Defendant's general presentence claim that he was unaware of the requirement for consecutive sentences, and mention that if "somebody" had told him of this sentencing outcome, he would have accepted an earlier plea offer was not a claim of ineffective assistance of counsel. Unlike *Ayres*, defendant's statement was not directed at defense counsel and did not assert that counsel was ineffective. Rather, it was a general expression of defendant's frustration with the outcome of the case. Therefore, it does not warrant a remand for *Krankel* proceedings.

¶ 33 III. CONCLUSION

¶ 34 For the foregoing reasons, we affirm the judgment of the circuit court of Iroquois County.

¶ 35 Affirmed.