2019 IL App (4th) 160530-U

NO. 4-16-0530

FILED
April 9, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
CLEMON ADKINSON,	)	No. 11CF355
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

PRESIDING JUSTICE HOLDER WHITE delivered the judgment of the court. Justices Turner and Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held*: We grant the Office of the State Appellate Defender's motion to withdraw as appellate counsel and affirm the trial court's judgment where no meritorious issues could be raised on appeal.

¶ 2 This case comes to us on the motion of the Office of the State Appellate Defender (OSAD) to withdraw as counsel on the ground that no meritorious issues can be raised on appeal. For the reasons that follow, we grant OSAD's motion and affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 In March 2011, the State charged defendant with aggravated battery with a firearm, a Class X felony (720 ILCS 5/12-4.2(a)(1) (West 2010)). The information alleged he discharged a firearm in the direction of Amanda Cavanaugh, causing a laceration on her head. Following a December 2011 trial, a jury found defendant guilty. Following a sentencing hearing, the trial court sentenced defendant to 30 years in the Illinois Department of Corrections.

¶ 5 In December 2013, defendant filed a *pro se* petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2012)), alleging, in part, that he was provided with ineffective assistance of counsel. Specifically, he alleged the State asked for a counteroffer if defendant rejected its initial offer of 25 years' imprisonment, but his trial counsel refused to convey defendant's counteroffer of 6 years' imprisonment prior to trial. Later that month, the trial court dismissed defendant's petition as frivolous and patently without merit. In its written order, the court noted (1) given defendant's violent criminal history, neither the State nor the court would have accepted defendant's counteroffer and (2) defendant had no constitutional right to engage in extended plea negotiations.

¶ 6 Defendant appealed, and this court reversed and remanded. *People v. Adkinson*, 2015 IL App (4th) 140019-U, ¶ 20. We found defendant stated the gist of a constitutional claim that trial counsel was ineffective for refusing to convey defendant's counteroffer during plea negotiations where the State specifically requested a counteroffer. Thus, we determined the trial court erred in dismissing defendant's petition at the first stage of proceedings. *Id.* ¶ 14.

¶ 7 On remand, the trial court appointed counsel to represent defendant. In March 2016, defendant filed an amended postconviction petition, which was divided into Parts I, II, and III. The amended petition alleged trial counsel rendered ineffective assistance in that she (1) failed to relay [defendant's] counteroffer to the State even after the State invited [defendant] to make a counteroffer and his attorney agreed to relay the counteroffer (Part I) and (2) failed to support defendant's theory of mistaken identity by investigating whether there were other suspects resembling defendant who lived in the area where the offense occurred (Part II). In Part III, postconviction counsel discussed several claims that defendant requested he include in the

amended petition but explained he could not sign the pleading as to the claims in that section "because of a professional inability to pursue claims believed to be meritless." Postconviction counsel attached to the amended petition a motion to withdraw as counsel and requested that, if permitted to withdraw, (1) the court strike the amended petition and (2) defendant "should not be deemed to have waived any claims addressed or not addressed" in the amended petition.

¶ 8 Defendant also filed a *pro se* "amendment-supplemental" postconviction petition, setting forth the four claims that postconviction counsel discussed in Part III of the amended petition. Defendant alleged trial counsel rendered ineffective assistance by failing to (1) investigate the origin of a neoprene face mask found near the crime scene, which may have been exculpatory, (2) cross-examine the victim regarding the extent of her injuries, (3) object to the prosecutor's use of the victim's allegedly perjured testimony, and (4) move to suppress the photo identifications of defendant.

¶ 9 In April 2016, the State filed a "Partial Motion to Dismiss and Toll Deadlines," in which it moved to dismiss the Part II and III claims in the amended petition and asked to toll the deadline for its response to the remaining claim, pending the trial court's ruling on the motion to withdraw. In May 2016, the trial court entered a written order granting the State's motion to dismiss the claims in Parts II and III of the amended petition and ordering an evidentiary hearing on the remaining ineffective assistance claim (Part I).

¶ 10 On July 13, 2016, the trial court conducted an evidentiary hearing on the remaining claim alleging trial counsel's failure to relay defendant's counteroffer during plea negotiations with the State. At the hearing, postconviction counsel withdrew his motion to withdraw as counsel. Postconviction counsel also made an oral motion to reconsider the trial

court's dismissal of the ineffective assistance claim discussed in Part II of the amended petition. The trial court denied the motion to reconsider.

¶ 11 The prosecutor at defendant's jury trial, Assistant State's Attorney Adam Dill, testified that he offered defendant a plea agreement of 25 years' imprisonment based on defendant's prior convictions for aggravated battery causing great bodily harm and domestic battery. Dill further testified that the offer was "firm" but that "if it was to vary it was going to be within a very small range[.]" The State tendered People's exhibit 1, an email from defendant's trial counsel to Dill dated November 21, 2011, approximately two weeks prior to trial. We note People's exhibit 1 does not appear in the record on appeal. Dill did not recall receiving the email, which conveyed a counteroffer of three years' imprisonment in exchange for defendant's plea of guilty to a lesser offense. Dill testified that had he received the email, he would not have accepted that counteroffer. Dill represented he would not have accepted a counteroffer of fewer than 20 years.

¶ 12 Assistant Public Defender Amanda Riess testified she represented defendant at the jury trial in this case. Defendant provided her with information about several possible alibi witnesses. Riess contacted one of the potential witnesses, defendant's mother, but she was unable to provide Riess with information sufficient to support an alibi defense. Defendant gave Riess the names of two other potential witnesses, including defendant's former roommate and the roommate's girlfriend. Riess contacted each of those witnesses, and both of them testified at trial. Riess did not recall defendant providing her with information about any other potential witnesses.

¶ 13 Riess believed the State's offer of 25 years was reasonable based on defendant's criminal history, and she conveyed that belief to defendant. Riess recalled that in October 2011,

defendant told her he would not have accepted an offer of 20 years had it been an option, he did not want her to make a counteroffer, and he wished to proceed to trial. Riess met with defendant again on November 21, 2011, when he asked her to submit a counteroffer to the State of three years, served at 50%, in exchange for his plea of guilty to a lesser offense. Riess testified she conveyed that counteroffer to the State by email the same day. She did not recall if Dill responded by email or in person, but she remembered "the answer was no." She did not recall defendant asking that she submit any other counteroffers.

¶ 14 On cross-examination, Riess testified she was "very sure" that the State would not accept defendant's counteroffer of three years and that she did not look into any specific offenses that would fall into that sentencing range based on the facts in this case. She did not recall defendant ever asking her to submit a counteroffer of six years.

¶ 15 Defendant testified that during the same meeting with Riess where he requested that she submit a counteroffer of three years, he also indicated he would accept six years. He testified that his intent after that meeting was to engage in further plea negotiations with the State and that he would have considered an offer from the State that was less than 25 years. Defendant recalled Riess calling his counteroffer of six years "ridiculous," and indicating that she " 'wouldn't even waste [the State's] time.' " His impression after the meeting was that Riess did not intend to relay his counteroffer of six years to the State.

¶ 16 On this evidence, the trial court dismissed the petition. Specifically, the trial court found defendant "has not shown ineffective assistance of counsel let alone prejudice."

¶ 17 Defendant filed a timely notice of appeal, and the trial court appointed OSAD to represent him. In October 2018, OSAD filed a motion for leave to withdraw as counsel, asserting a lack of meritorious claims to raise on appeal. On its own motion, this court granted defendant

leave to file additional points and authorities by November 7, 2018. He filed none. After examining the record, we grant OSAD's motion and affirm the trial court's judgment.

¶ 18 II. ANALYSIS

¶ 19 OSAD contends any argument that the trial court erred in dismissing defendant's amended postconviction petition would be without merit. We agree.

¶ 20 A. Standards of Review

¶ 21 The Act provides a mechanism for a criminal defendant to challenge his conviction or sentence based on a substantial violation of federal or state constitutional rights. *People v. Morris*, 236 Ill. 2d 345, 354, 925 N.E.2d 1069, 1074-75 (2010). Proceedings under the Act are collateral in nature and not an appeal from the defendant's conviction or sentence. *People v. English*, 2013 IL 112890, ¶ 21, 987 N.E.2d 371.

¶ 22 Proceedings under the Act are divided into three stages. *Id.* ¶ 23. At the first stage, the trial court reviews the petition to determine whether it is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2014). If the petition survives the first stage, the trial court advances the petition to the second stage. *Id.* § 122-2.1(b).

¶ 23 At the second stage, the trial court may appoint counsel for the defendant to ensure the adequate presentation of the defendant's claims. *People v. Pendleton*, 223 Ill. 2d 458, 472, 861 N.E.2d 999, 1007 (2006). At this point, the State may file an answer or a motion to dismiss the petition. 725 ILCS 5/122-5 (West 2014). The trial court may dismiss the petition at the second stage if, taking all well-pleaded facts as true, the defendant fails to demonstrate a substantial showing of a constitutional violation. *Pendleton*, 223 Ill. 2d at 473. To make such a showing, "the allegations in the petition must be supported by the record in the case or by its accompanying affidavits." *People v. Coleman*, 183 Ill. 2d 366, 381, 701 N.E.2d 1063, 1072

(1998). "Nonfactual and nonspecific assertions which merely amount to conclusions are not sufficient to require a hearing under the Act." *Id.* We review the trial court's dismissal of the petition at this stage *de novo*. *Pendleton*, 223 Ill. 2d at 473.

¶ 24 If the trial court denies the State's motion to dismiss, or no motion to dismiss is filed, "the State must answer the petition, and, barring the allowance of further pleadings by the court, the proceeding then advances to the third stage, a hearing wherein the defendant may present evidence in support of the petition." *Id.* at 472-73 (citing 725 ILCS 5/122-6 (West 2000)). After an evidentiary hearing where fact-finding and credibility determinations are involved, the trial court's decision will not be reversed unless it is manifestly erroneous. *Coleman*, 183 Ill. 2d at 385. A decision is manifestly erroneous if a clearly evident, plain, and indisputable error occurs. *People v. Ortiz*, 235 Ill. 2d 319, 333, 919 N.E.2d 941, 949 (2009).

¶ 25 Here, all of defendant's claims allege trial counsel rendered ineffective assistance in violation of his rights under the Illinois and United States Constitutions. U.S. Const., amend. VI; Ill. Const. 1970, art. 1, § 8. We evaluate these claims under the familiar test announced by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, the defendant must show (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonably probability that the outcome of the proceeding would have been different. *Id.* at 688-694; *Coleman*, 183 Ill. 2d at 397. In making this showing, "a defendant must overcome the strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not of incompetence." *Coleman*, 183 Ill. 2d at 397. In order to obtain relief on a claim of ineffective assistance of counsel, a defendant must satisfy both prongs of *Strickland*. *Id.*

¶ 26 Because several of defendant's claims were dismissed at the second stage of proceedings and one was dismissed after an evidentiary hearing, we discuss each of the potential issues presented by OSAD to determine whether any of them have merit under the appropriate standards of review.

¶ 27 B. Second Stage of Proceedings

¶ 28 OSAD contends any argument the trial court erred in dismissing certain claims at the second stage of proceedings would be meritless. We agree.

¶ 29 At the second stage of proceedings, defendant was required to make a substantial showing that trial counsel was ineffective for failing to (1) investigate and present exculpatory evidence regarding the existence of other persons who closely resembled him and may have committed the offense, (2) investigate the origin of a neoprene face mask found near the crime scene, which may have been exculpatory, (3) cross-examine the victim regarding the extent of her injuries, (4) object to the prosecutor's use of the victim's allegedly perjured testimony, and (5) move to suppress the photo identifications of defendant. Defendant failed to make such a showing as to any of these claims.

¶ 30 First, defendant did not adequately support by affidavit or other specific facts his contention that other persons existed who closely resembled him and that they may have been present at the time of the offense. Although defendant averred that he identified these potential suspects to Riess, he failed to provide names or other identifying information about those individuals. These bare assertions were clearly insufficient to warrant an evidentiary hearing.

¶ 31 Second, defendant failed to demonstrate that trial counsel's alleged failure to investigate the origin of a neoprene mask found near the crime scene prejudiced him. Even if a deoxyribonucleic acid (DNA) analysis had been performed on the mask and that analysis

excluded defendant, it would have been irrelevant to his defense. Here, no one alleged that defendant ever wore a mask. Under these circumstances, there is no reasonable probability that the outcome of the trial would have been different if counsel had further investigated the origin of the mask.

¶ 32 Third, defendant failed to overcome the presumption that trial counsel's decision not to cross-examine the victim regarding the extent of her injuries was a matter of sound trial strategy. "Whether, and how, to cross-examine a witness is normally a matter of trial strategy, which will not by itself support a claim of ineffective assistance under *Strickland*." *People v. Salgado*, 263 Ill. App. 3d 238, 246, 635 N.E.2d 1367, 1373 (1994). OSAD argues that "[t]he relevant issue was whether [defendant] was the shooter, not how much damage the bullet caused." Furthermore, the record shows that trial counsel did, in fact, object to some aspects of the victim's testimony regarding the effects of her injuries. We cannot say that trial counsel's decision not to cross-examine the victim on the extent of her injuries was the result of deficient performance rather than a legitimate strategy to avoid appearing unsympathetic to the victim and her injuries.

¶ 33 Fourth, defendant pointed to no specific facts to show the prosecutor elicited perjured testimony from the victim and that trial counsel was therefore ineffective for failing to object to it. Defendant's references to minor inconsistencies between the accounts of the two main witnesses, most of which relate to trivial matters, do not amount to evidence of perjury. Furthermore, trial counsel adequately explored several of these inconsistencies during closing argument. Again, defendant's conclusory allegations were insufficient to warrant an evidentiary hearing on this claim.

¶ 34 Fifth, defendant failed to show he suffered prejudice from trial counsel's failure to object to the photo array evidence presented at trial. First, defendant alleged no specific facts that demonstrate the photo array was in any way unduly suggestive. Additionally, one witness testified she had known defendant for over a year and had socialized with him more than 40 times. Finally, the victim testified to making eye contact with defendant and observed his appearance for at least 30 seconds. Given the overwhelming identification evidence against defendant, there is no reasonable probability that the outcome of the trial would have been different if counsel had objected to the photo array.

¶ 35 Accordingly, we agree with OSAD that no colorable argument can be made the trial court erred in dismissing any of the aforementioned claims at the second stage of postconviction proceedings.

¶ 36 C. Third Stage of Proceedings

¶ 37 Finally, OSAD contends it can make no colorable argument the trial court erred in dismissing his ineffective assistance claim after an evidentiary hearing. We agree.

¶ 38 As noted above, we will not reverse the trial court's decision after an evidentiary hearing in a postconviction proceeding unless the decision was manifestly erroneous. *Coleman,* 183 Ill. 2d at 385. Here, we cannot say the trial court's finding that defendant's ineffective assistance claim failed on the merits was manifestly erroneous. Defendant failed to demonstrate any ineffectiveness on the part of Riess where testimony at the hearing showed Riess did, in fact, convey a counteroffer to the State prior to trial. Furthermore, defendant suffered no prejudice because it was uncontroverted that the State would not have even considered any counteroffer of fewer than 20 years. Riess testified defendant would not have accepted an offer of 20 years and that he wanted to proceed to trial. On these facts, there is no reasonable probability the outcome

of the proceedings would have been different if the counteroffer was three years or six years; under either scenario, defendant's counteroffer would have been rejected.

¶ 39 Accordingly, we agree with OSAD that no colorable argument can be made the trial court erred in dismissing his ineffective assistance claim after an evidentiary hearing.

¶ 40 III. CONCLUSION

¶ 41 For the reasons stated, we grant OSAD's motion for leave to withdraw as counsel and affirm the trial court's judgment.

¶ 42 Affirmed.