2019 IL App (4th) 170948-U

NO. 4-17-0948

FILED
July 23, 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 the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
BRIAN D. MAGGIO,	)	No. 10CF1252
Defendant-Appellant.	)	
	)	Honorable
	)	Heidi N. Ladd,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Holder White and Justice Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in summarily dismissing defendant's *pro se* petition for postconviction relief, as defendant failed to state the gist of a constitutional claim his trial counsel provided ineffective assistance by not seeking additional relief after the State failed to disclose testimony before trial.

¶ 2 In September 2017, defendant, Brian D. Maggio, filed a *pro* se petition under the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-8 (West 2016)), alleging trial counsel was ineffective in not moving to strike non-disclosed, prejudicial testimony during the examination of two State witnesses. The trial court found the petition frivolous and patently without merit and summarily dismissed it in the first stage of proceedings. On appeal, defendant argues the court's dismissal was erroneous as the petition states the gist of a constitutional claim. We disagree and affirm.

¶ 3 I. BACKGROUND

¶ 4 In July 2010, defendant was arrested and charged with the first-degree murder of his brother, Mark Maggio (720 ILCS 5/9-1(a)(1) (West 2010)). In June 2011, defendant entered a negotiated guilty plea in exchange for a sentencing cap of 35 years' imprisonment. The court sentenced defendant to 35 years. In November 2012, defendant filed a postconviction petition, asserting his plea was void and should be vacated. Defendant argued his sentence was illegal as it did not include the requisite firearm enhancement. The trial court agreed, vacating defendant's plea and setting the case for trial.

¶ 5 In January 2015, defendant's jury trial was held. According to the evidence at trial, defendant and Mark were business partners who operated grocery stores and a convenience store. Defendant managed an IGA in Tolono, Illinois (Tolono IGA), while Mark managed a store in Arcola, Illinois. Over time, the brothers' personal and professional relationship deteriorated, and they only communicated about the businesses through their wives and lawyers. On July 21, 2010, the brothers were both at the Tolono IGA, and a confrontation between the two ended when defendant shot Mark. The State presented testimony showing defendant shot Mark in the back while Mark was attempting to run from the store. Defendant testified he shot Mark in self-defense.

¶ 6 At trial, the State presented the testimony of a number of witnesses. Given the issue on appeal, we need not summarize the trial testimony of each witness. We summarize only the testimony necessary to resolve defendant's appeal.

¶ 7 In its case in chief, the State called the following individuals from the Tolono Fire Department: Doug Dillavou, Jared Ping, Sean Manuel, and Kyle Hayden. Each of these four

responded to the July 21, 2010, dispatch to the Tolono IGA.

¶ 8 The first to testify was Doug Dillavou, chief of the Tolono Fire Department. Chief Dillavou testified he knew defendant and Mark for "quite a few years." He arrived at the scene, where he saw Chief Richard Raney and Mark. Chief Dillavou checked Mark's pulse and for breathing and observed no signs of life. At some point, while Chief Dillavou was talking to Chief Raney, defendant approached and said, "[I]s he dead yet?"

¶ 9 Jared Ping, a member of the Tolono Fire Department, testified he was dispatched to the scene to provide medical services to the victim. Just after he arrived at the store and while the fire department personnel "were placing AED pads," defendant walked up and asked, "[I]s he dead yet?" Defendant did not look distraught.

¶ 10 After Ping testified, defendant moved for a mistrial or, in the alternative, to strike Chief Dillavou's and Ping's testimony defendant asked if Mark was "dead yet[.]" Defendant argued neither witness reported this statement before trial. Defendant further argued the State knew as early as the week before these "very damaging statements" would be made on the record but did not disclose them. In response, the State argued the evidence was not exculpatory and need not be disclosed as defendant had the opportunity to interview these witnesses.

¶ 11 The trial court concluded the State committed a discovery violation. The court, however, observed there existed "a judicial preference for a continuance or a recess, and [the] exclusion of the evidence is the last resort when that would be ineffective." The court reasoned no one argued had the information been disclosed earlier, "there would have been any difference in terms of the cross[-]examination." The court indicated it would afford defendant the opportunity for a continuance and to interview the witnesses further. The court denied the

request for a mistrial or to strike the testimony. The court then gave defense counsel time over the lunch recess to determine "what relief you're seeking."

¶ 12 After recess, the trial court provided defense counsel the opportunity to request specific relief in regards to the late disclosure of the statements. Counsel asked the trial court to "reserve any potential remedy." Counsel reported the following, asking for additional time:

> "We are attempting to contact some witnesses, doing things that we might've done last week had we known this information. A number of these firefighters are at a funeral today after one of their fellow colleagues passed away due to cancer. We are hoping to get some information and perhaps could ask for some other potential remedy either later this afternoon or tomorrow, if the court would allow us to."

The trial court granted counsel the time he sought and told counsel to "[s]imply call it to my attention then if you're at a point where there is some relief you're seeking."

¶ 13 When the testimony resumed, Sean Manuel, an employee of the Tolono Fire Department, testified he and other members of the fire department were attending to Mark. While doing so, Manuel saw defendant standing to the side of Mark's head. Defendant began kicking Mark and, with a stern voice, "asking or stating, is he dead[.]" Manuel believed defendant made the statement two or three times. When defendant made these statements, Chief Dillavou was next to the soda machines on the radio with other agencies. Ping, Hayden, and Manuel were next to Mark.

¶ 14 Kyle Hayden, a lieutenant with the Tolono Fire Department, testified he

responded to the IGA upon receiving a call regarding the shooting. According to Lieutenant Hayden, he, Chief Dillavou, Ping, and Manuel applied emergency medical procedures on the victim. While Lieutenant Hayden was working on Mark, defendant approached. Lieutenant Hayden heard defendant say in a "very calm" voice, "[I]s he dead? Is he dead?" Defendant, at the time, was standing near Mark's feet. Lieutenant Hayden did not see defendant kick Mark.

¶ 15 The jury found defendant guilty of first-degree murder. The trial court sentenced defendant to 65 years' imprisonment. On direct appeal, this court affirmed defendant's conviction but remanded for resentencing upon concluding the sentencing court improperly considered defendant's invocation of the right to remain silent as an aggravating factor. *People v. Maggio*, 2017 IL App (4th) 150287, ¶¶ 49-50, 57, 80 N.E.3d 72. On remand, the court imposed a 64-year sentence.

¶ 16 In September 2017, defendant filed a *pro se* postconviction petition. Defendant argued, in part, the testimony of Chief Dillavou and Ping that defendant approached them and asked if Mark was "dead yet" as well as Ping's testimony defendant kicked Mark should have been stricken as the statements were not disclosed in discovery. Defendant further asserted appellate counsel was ineffective for not raising the issue on direct appeal.

¶ 17 In November 2017, the trial court summarily dismissed defendant's petition. The court found defendant forfeited the issues raised in his petition, concluding they could have and should have been raised on direct appeal. The court further concluded defendant's *pro se* arguments lacked merit and failed to present the gist of a constitutional claim.

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 On appeal, defendant argues the trial court erred in summarily dismissing his petition. Defendant contends his *pro se* claims present the gist of a claim trial counsel was ineffective for failing to renew his motion to strike Chief Dillavou's and Ping's testimony and appellate counsel was ineffective for not raising this argument on direct appeal.

¶ 21 Under the Post-Conviction Hearing Act, a defendant may acquire postconviction review of a claim his conviction led to a substantial denial of his constitutional rights via a three-stage process. *People v. Jones,* 213 Ill. 2d 498, 503, 821 N.E.2d 1093, 1096 (2004). A petitioner initiates this process by filing a postconviction petition. See *People v. Brown*, 236 Ill. 2d 175, 184, 923 N.E.2d 748, 754 (2010). During the first stage, the trial court's role is to examine the petition and determine whether the claims within the petition are frivolous or patently without merit. See *People v. Andrews*, 403 Ill. App. 3d 654, 658-59, 936 N.E.2d 648, 652 (2010). The court completes this task without input from the parties and by taking the allegations of the petition as true and liberally construing such allegations. *People v. Couch*, 2012 IL App (4th) 100234, ¶ 11. The threshold for a petitioner to survive first-stage review is low, as the defendant need only state the gist of a constitutional claim by pleading facts sufficient "to assert an arguably constitutional claim." *Brown*, 236 Ill. 2d at 184. If the court finds the petition frivolous and patently without merit, it must dismiss the petition. 725 ILCS 5/122-2.1(a)(2) (West 2012). This case involves a first-stage dismissal of defendant's postconviction petition, meaning our review is *de novo*. *Couch*, 2012 IL App (4th) 100234, ¶ 13.

¶ 22 The constitution guarantees criminal defendants the right to the effective assistance of counsel. *People v. Domagala*, 2013 IL 113688, ¶ 36 (quoting U.S. Const., amends. VI, XIV). Defendant asserts he was denied this right at trial. In proceedings under the Post-

Conviction Hearing Act, a defendant's petition asserting ineffective assistance must show both "(i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *People v. Hodges*, 234 Ill. 2d 1, 17, 912 N.E.2d 1204, 1212 (2009).

¶ 23 We find defendant's allegations insufficient to state the gist of a constitutional claim of ineffective assistance as the allegations do not show it is arguable counsel's performance was objectively unreasonable. In this case, at the close of Ping's testimony, trial counsel moved for a mistrial and to strike Chief Dillavou's and Ping's testimony defendant asked if Mark was "dead yet[.]" The trial court agreed the State committed a discovery violation but denied the motion to strike or for a mistrial. Instead, the court offered counsel other relief, such as additional time to interview witnesses, as needed. Later in the State's case, two additional witnesses, Lieutenant Hayden and Manuel, testified defendant asked if Mark was "dead yet[.]" In these circumstances, it is not arguably unreasonable for trial counsel not to ask the court to reconsider its decision not to strike the testimony of Chief Dillavou and Ping. The trial court already denied such a request. Had the court reversed its earlier decision, it would have had to remind the jury of the damaging statements before telling the jury to ignore them. Trial counsel's decision to avoid reminding the jury of this testimony, particularly after the jury heard two additional witnesses testify to the same, is a reasonable exercise of trial strategy and not arguably objectively unreasonable. See *People v. White*, 2011 IL App (1st) 092852, ¶ 75, 963 N.E.2d 994 (citing *People v. Evans*, 209 Ill. 2d 194, 221, 808 N.E.2d 939, 954 (2004)) ("Our Supreme Court has recognized that an attorney may forego an objection or a motion to strike for strategic reasons.").

¶ 24 Moreover, defendant's allegations do not show it is arguable he suffered prejudice due to counsel's performance. In the context of effectiveness claims, the question of whether the defendant is prejudiced is whether counsel's "deficient performance prejudiced the defense in that absent counsel's deficient performance there is a reasonable probability that the result of the proceeding would have been different." *Evans*, 209 Ill. 2d at 219-20. Defendant's allegations fail to establish it is arguable, absent counsel's failure to seek reconsideration of the order denying his motion to strike, a reasonable probability exists the result of the trial would have been different. Both Lieutenant Hayden and Manuel testified to hearing defendant ask if Mark was "dead yet[.]" Because the jury heard defendant made the statements from two other witnesses, it is not arguable a reasonable probability exists the outcome of the trial would have been different had Chief Dillavou's and Ping's testimony been stricken.

¶ 25 The trial court did not err in finding the postconviction petition frivolous and patently without merit and in summarily dismissing it.

¶ 26 III. CONCLUSION

¶ 27 We affirm the trial court's judgment.

¶ 28 Affirmed.