2014 IL App (3d) 120386-U

Order filed April 21, 2014

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 21st Judicial Circuit, Kankakee County, Illinois,
Respondent-Appellee,	)	
	)	Appeal No. 3-12-0386
v.	)	Circuit No. 02-CF-116
	)	
TODD SAXON,	)	Honorable Gordon L. Lustfeldt,
Petitioner-Appellant.	)	Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Justices Holdridge and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: Petitioner did not show that his postconviction petition should have advanced to the third stage of proceedings, as the petition did not make a substantial showing of either: (1) ineffective assistance of trial and appellate counsel; or (2) actual innocence.

¶ 2 Petitioner, Todd Saxon, appeals the trial court's dismissal of his second-stage postconviction petition. On appeal, petitioner argues that his petition warranted a third-stage evidentiary hearing because it made a substantial showing of: (1) ineffective assistance of trial

and appellate counsel; and (2) actual innocence in that the deoxyribonucleic acid (DNA) match relied on by the State at trial was inadequate. We affirm.

¶ 3 FACTS

¶ 4 On April 11, 2002, petitioner was charged by indictment with three counts of first degree murder (720 ILCS 5/9-1(a)(1), (2), (3) (West 1994)), and one count each of arson (720 ILCS 5/20-1(a) (West 1994)) and concealment of a homicidal death (720 ILCS 5/9-3.1(a) (West 1994)). The third murder charge alleged that while committing or attempting to commit a forcible felony, criminal sexual assault (720 ILCS 5/12-13 (West 1994)), petitioner stabbed O.W., the victim, about the chest with a sharp instrument and thereby caused her death.

¶ 5 Prior to trial, the State filed a motion *in limine* to admit evidence of petitioner's other instances of sexual misconduct to prove his propensity to commit sexual offenses. 725 ILCS 5/115-7.3 (2002). The motion alleged that prior to the charged offenses, petitioner had sexually assaulted four other minors. The trial court denied the motion.

¶ 6 On February 22, 2005, the case proceeded to a jury trial. The evidence at trial showed that on March 27, 1995, O.W. was 12 years old. At the time, O.W. lived with her mother, Regina Collins, and brother, John W., at 156 South Wildwood, Kankakee. O.W. also shared the house with Webster Collins, Pierre Saxon, Elsi Saxon, Contessa Kilpatrick, Catrina Haut, and Bobbie Jackson. Occasionally, petitioner stayed at the house and shared a bedroom with John.

¶ 7 On the night of March 27, 1995, O.W. went to bed around 9 p.m. Between 11:30 p.m. and midnight, an argument broke out between Contessa and her boyfriend, Dwight Phagan. Regina told Contessa and Dwight to keep it down, and Pierre told the couple to take the argument outside. Both Regina and Pierre stated that O.W. was in her bed when they checked on her after reprimanding Contessa and Dwight. Contessa said that during the argument, O.W. came out of her room and asked who was in the bathroom. Contessa responded "that bitch,"

referring to Dwight, and O.W. laughed. This was the last time Contessa saw O.W. The following morning, John reported that O.W. was not in her bed, and Pierre did not notice any signs of a break-in. Several witnesses remembered that petitioner was at the house the previous night.

¶ 8 On March 30, 1995, O.W.'s body was found in a burned garage. A shirt and a pair of women's underwear were found near the body. Petitioner's aunt, Alean Ward, had previously lived at the house where the fire occurred. After the fire, petitioner told Ward that the body found inside the garage was probably that of O.W., who was missing. Ward responded that it could be anybody and petitioner, who was "kind of upset," reported that he thought it was O.W.

¶ 9 On April 25, 1995, Kankakee police officer Jeffrey Powell spoke with petitioner about O.W.'s disappearance. Petitioner said he last saw O.W. between 8 and 9 p.m. on March 27, 1995. At O.W.'s house, petitioner observed an argument between Contessa and Dwight. Petitioner told Powell that he left the house between 11:40 p.m. and midnight. Petitioner agreed to provide a blood sample the following day, but did not appear. In two subsequent interviews, petitioner gave excuses for why he could not provide a blood sample.

¶ 10 In September 1995, Kankakee police detective Larry Osenga interviewed petitioner. Petitioner told Osenga that he was at O.W.'s house on March 27, 1995, around 10 or 11 p.m. or midnight. While at the house, petitioner saw Contessa and Dwight arguing. Petitioner also remembered that O.W. was developing at an early age, and Regina was not doing a good job taking care of her or the other children. On March 28, 1995, petitioner helped look for O.W.

¶ 11 Osenga conducted a second interview with petitioner on September 2, 1997. At that time a blood draw was arranged for September 4, 1997, but petitioner never provided a sample. In February 2000, Kankakee police detective Jay Etzel obtained a search warrant for petitioner's DNA.

¶ 12 Dr. Joseph Sapala performed the autopsy of O.W. Sapala stated that O.W. died from hemorrhagic shock resulting from two stab wounds to the left chest. Sapala opined that O.W. was dead before the fire. During the autopsy, Sapala used a Vitullo kit, also known as a rape kit, to collect sexual assault evidence from O.W.'s vagina, cervix, anus, and mouth.

¶ 13 The parties stipulated that Melissa Staples, a qualified DNA examiner, would testify that based on the DNA evidence, Pierre, Dwight, and several others were excluded as sources of DNA obtained from the sperm fraction recovered on the rectal swab.

¶ 14 Illinois State Police forensic scientist Daniel Gandor analyzed the DNA recovered from O.W. As part of his work, Gandor analyzed DNA from a suspect's buccal swab or blood draw with DNA evidence discovered at the crime scenes. Typically, Gandor examined 13 polymorphic locations, or loci. The 13 loci were selected by the Federal Bureau of Investigation as areas where DNA differs significantly from person to person. From the 13 loci, Gandor would develop a unique profile of the contributor. Gandor then compared the contributor profile with that of a suspect and determined the frequency that a profile match would likely reoccur within the human population. Gandor noted that his ability to analyze the DNA from a biological sample was affected by the sample's exposure to moisture, heat, or light because such exposure can cause the DNA to break apart. Additionally, DNA recovered from a victim's rectal canal degrades rapidly as a result of the bacterial presence. Sperm cells retrieved from a victim's rectal canal were less likely to produce a viable DNA profile more than 72 hours after sexual intercourse.

¶ 15 In the instant case, Gandor analyzed DNA from a sperm cell discovered in O.W.'s rectum at nine loci. Gandor was unable to conduct a 13-loci analysis because he did not have enough DNA. Petitioner's DNA sample matched the nine loci of the DNA recovered from O.W.'s rectum. As a result, Gandor opined that the DNA removed from O.W.'s rectum was contributed

by petitioner. The frequency for recurrence of this match was 1 in 24 trillion African-Americans, 1 in 11 trillion Hispanics, and 1 in 4.7 trillion Caucasians.

¶ 16 After learning that petitioner's DNA matched the DNA recovered from O.W.'s rectum, Etzel interviewed petitioner on February 16, 2001. At the start of the interview, petitioner appeared nervous and was pacing. When confronted with the DNA evidence, petitioner denied involvement with O.W. and said that he never touched her. Petitioner denied being at O.W.'s house on March 27, 1995, but when confronted with Contessa's statement that petitioner was in the house, petitioner admitted to being present for about 20 seconds around 10 p.m.

¶ 17 Initially, petitioner would not respond to questions about having sex with O.W., but eventually claimed that he had sex with O.W. once. Petitioner said he had sex with O.W. two days before her disappearance in John's bedroom at the house on 156 South Wildwood. Petitioner loved O.W. and said that he was the only one she could trust. Petitioner knew O.W. had not told anyone that they had sex. Petitioner also said that O.W. was having sex with many boys. He had once walked in on O.W. having sex with various boys, and he chased them off. Petitioner also recalled seeing O.W. run upstairs from the basement with Marvin Landfair, who was pulling up his pants. Petitioner told Etzel that Landfair had killed O.W. because petitioner had seen Landfair four days after O.W.'s disappearance with blood on his jacket.

¶ 18 During closing arguments, the State argued that petitioner's statement to Etzel pertaining to the time he had sex with O.W. was disputed by Gandor's testimony that DNA could not be extracted from a biological sample that was more than 72 hours old. The State argued that the sexual assault therefore likely occurred after 11 p.m. on March 27, 1995, and after anyone besides petitioner saw O.W. alive.

¶ 19 The jury found petitioner guilty on all counts. The trial court sentenced petitioner to concurrent terms of natural life imprisonment for first degree murder, seven years for arson, and

five years for concealment of a homicidal death. On direct appeal, we held that the evidence was sufficient to sustain petitioner's convictions. *People v. Saxon*, 374 Ill. App. 3d 409 (2007).

¶ 20 On July 7, 2008, petitioner filed a *pro se* postconviction petition. On December 8, 2008, petitioner filed a "Verified Petition for Post-Conviction Relief" (verified petition). The verified petition alleged a claim of actual innocence because the DNA evidence presented at trial provided a match at only nine loci. The trial court appointed counsel, who filed an amended petition. The amended petition alleged that petitioner received ineffective assistance of trial and appellate counsel, who failed to challenge the admission of evidence of petitioner's prior sexual misconduct with O.W. The amended petition also incorporated all of the previous *pro se* pleadings by reference. The trial court granted the State's motion and dismissed the petition. Petitioner appeals.

¶ 21 ANALYSIS

¶ 22 I. Ineffective Assistance

¶ 23 Petitioner argues that his postconviction petition made a substantial showing that he was denied effective assistance of trial and appellate counsel because both attorneys failed to challenge the impropriety of the use of evidence of petitioner's prior sexual misconduct with O.W.

¶ 24 The Post-Conviction Hearing Act provides a three-stage review process for criminal defendants to challenge the validity of their convictions based on constitutional violations. 725 ILCS 5/122-1 *et seq*. (West 2008); *People v. Domagala*, 2013 IL 113688. At the second stage of proceedings, all well-pleaded facts that are not positively rebutted by the trial record are taken as true. *People v. Pendleton*, 223 Ill. 2d 458 (2006). To proceed to a third-stage evidentiary hearing, the allegations in the petition, as supported by the record or accompanying affidavits, must make a substantial showing of a constitutional violation. *People v. Rissley*, 206 Ill. 2d 403

(2003). Postconviction proceedings are limited to constitutional matters that have not been, nor could have been, previously adjudicated. *Id.* Issues which could have been raised on direct appeal, but were not, are procedurally defaulted, and any issues which have been decided by a reviewing court are barred by the doctrine of *res judicata*. *Id.* We review the second-stage dismissal of a postconviction petition *de novo*. *Pendleton*, 223 Ill. 2d 458.

¶ 25 Initially, the State argues that petitioner has waived review of his ineffective assistance of trial counsel argument because it could have been raised on direct appeal. However, we relax the waiver rule because petitioner argues that the default was the result of ineffective assistance of appellate counsel. *People v. Williams*, 209 Ill. 2d 227 (2004). To advance to a third-stage evidentiary hearing, petitioner must make a substantial showing that: (1) counsel's performance was so deficient that it fell below an objective standard of reasonableness; and (2) there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Manning*, 241 Ill. 2d 319 (2011); *Strickland v. Washington*, 466 U.S. 668 (1984); see also *People v. English*, 2013 IL 112890 (applying the *Strickland* ineffective assistance test to appellate counsel).

¶ 26 In the instant case, petitioner fails to make a substantial showing that trial or appellate counsel's performance was so deficient that it altered the outcome of the proceeding. Evidence of a defendant's other crimes is generally inadmissible if offered only to demonstrate a defendant's propensity to commit the charged offense. *People v. Donoho*, 204 Ill. 2d 159 (2003). However, evidence of other crimes may be admitted to prove intent, *modus operandi*, identity, motive, absence of mistake, or any relevant fact other than propensity. *Id.* Other-crimes evidence is admissible so long as it bears some threshold similarity to the crime charged and its probative value outweighs the prejudicial impact. *People v. Wilson*, 214 Ill. 2d 127 (2005); *People v. Chapman*, 2012 IL 111896.

¶ 27 Here, petitioner has not shown that if trial counsel had objected to Etzel's testimony pertaining to petitioner's prior sexual misconduct with O.W., the court would have excluded the evidence. Evidence of petitioner's prior sexual misconduct with O.W. was relevant to prove petitioner's motive to silence O.W., and it also served as evidence of the predicate felony for the felony murder charge. Further, the probative value of this evidence was not outweighed by its prejudicial impact. The evidence was similar to the predicate felony described in the felony murder charge and was limited to petitioner's sexual misconduct with the victim in this case. When viewed in combination with Gandor's statement that the DNA found in O.W.'s rectum matched petitioner's DNA and was likely less than 72 hours old, the evidence was also probative of the fact that petitioner had sex with O.W. close to the time of the murder.

¶ 28 We hold that trial and appellate counsel were not ineffective for failing to raise this issue because the evidence would have been admitted over an objection and would not have warranted a reversal on appeal. We need not determine whether counsel's performance was deficient because petitioner has not made a substantial showing that he suffered prejudice. *People v. Graham*, 206 Ill. 2d 465 (2003).

¶ 29 II. Actual Innocence

¶ 30 Petitioner argues that his petition sets forth a claim of actual innocence based, in part, on an insufficient DNA match. Petitioner further contends that postconviction counsel provided unreasonable assistance because he did not adequately present this issue to the trial court.

¶ 31 In the verified petition, petitioner argued that he was actually innocent of the offense in part because the State relied upon a nine-loci DNA analysis. On appeal, petitioner clarified that the 9-loci analysis was insufficient given the prevailing use of the 13-loci analysis. See *People v. Barker*, 403 Ill. App. 3d 515, 527 (2010) (noting the two testing kits used on the DNA evidence created a profile across "13 core loci"); *People v. Williams*, 238 Ill. 2d 125 (2010) (DNA was

analyzed at 13 loci); *In re Jessica M.*, 399 Ill. App. 3d 730 (2010) (noting there are now 13 loci analyzed by the FBI and used for comparison of unknown profiles obtained from crime scene evidence with known profiles in the Combined DNA Index System database). Petitioner argues that the instant case is analogous to *People v. Watson*, 2012 IL App (2d) 091328. In that case, Watson argued that he received ineffective assistance of trial counsel because counsel did not adequately challenge the partial-profile DNA comparisons. The DNA expert testified that he compared Watson's DNA standard to the seven loci of DNA recovered from hairs discovered at the crime scene. *Id.* From this evidence, the expert stated that he was unable to exclude defendant as contributing to the DNA recovered from the scene. *Id.* The appellate court found that the DNA was the only evidence linking defendant to the crime, and therefore it was "objectively unreasonable for counsel to refrain from pursuing, *in any regard*, a challenge to the *significance*, if any, of the alleged seven-loci match presented." (Emphasis in original.) *Id.* ¶ 31.

¶ 32 The instant case differs from *Watson* in several aspects. First, the DNA recovered from the victim matched petitioner's DNA at all of the nine loci compared. Gandor indicated that the nine-loci analysis was the result of the condition of the body that the DNA evidence was procured from, and the biological material discovered in O.W.'s rectum was insufficient to conduct a full 13-loci analysis. Despite the state of the evidence, Gandor was able to conclude that petitioner contributed the DNA in the sample.

¶ 33 Secondly, in contrast to *Watson*, the DNA evidence was not the sole evidence of petitioner's guilt, and we conclude that petitioner neither established a claim of actual innocence nor that postconviction counsel provided unreasonable assistance in respect to this issue. In postconviction proceedings, a defendant has no constitutional right to the assistance of counsel, but is entitled to a "reasonable level of assistance." *People v. Owens*, 139 Ill. 2d 351, 359 (1990); see also 725 ILCS 5/122-4 (West 2008). Postconviction counsel is only required to

investigate and properly present a defendant's claims and need not amend the petition to advance nonmeritorious claims. *Pendleton*, 223 Ill. 2d 458. Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984) requires that postconviction counsel: (1) consult with petitioner to ascertain his contention of deprivations of constitutional rights; (2) examine the record of the proceeding at trial; and (3) make any amendments to th*e pro se* petition necessary for an adequate presentation of the petitioner's claims.

¶ 34 Here, postconviction counsel included defendant's actual innocence arguments in the amended petition by reference to the verified petition. Counsel's decision not to further develop the actual innocence claim was not unreasonable. To warrant relief under a claim of actual innocence, the evidence adduced by petitioner must be: (1) unavailable at trial; (2) such that petitioner could not have discovered the evidence sooner through diligence; and (3) material and noncumulative and of such conclusive character that it would probably change the result on retrial. *People v. Morgan*, 212 Ill. 2d 148 (2004).

¶ 35 Petitioner cannot show that a challenge to the sufficiency of the DNA analysis would prove his innocence of the underlying offense. Petitioner has presented no evidence or case law establishing that a nine-loci analysis is inherently unreliable. Additionally, unlike *Watson*, the DNA was not the only evidence linking defendant to the charged offense. In addition to the DNA, evidence was presented that tended to show petitioner's consciousness of guilt. See *Saxon*, 374 Ill. App. 3d 409. This circumstantial evidence included petitioner's: (1) denial and later admission to having sex with the victim prior to her disappearance; (2) failure to volunteer a DNA sample; and (3) initial denial of being at the victim's house on the night of her disappearance. Additionally, evidence was presented that petitioner was in the victim's house on the night of the disappearance and was familiar with the property where the body was found.

¶ 36 From the foregoing, we conclude that the petitioner did not make a substantial showing

of actual innocence, nor did postconviction counsel act unreasonably in choosing not to further develop petitioner's actual innocence argument.

¶ 37 CONCLUSION

¶ 38 For the foregoing reasons, the judgment of the circuit court of Kankakee County is affirmed.

¶ 39 Affirmed.