2011 IL App (1st) 092905-U

FIRST DIVISION
DATE 11/14/11

No. 1-09-2905

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 03 CR 26048
	)	
ALBERT DOMAGALA,	)	Honorable
	)	Kevin M. Sheehan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Justices KARNEZIS and ROCHFORD concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's post-conviction petition was properly dismissed where it failed to make a substantial showing of ineffective assistance of trial and appellate counsel.

¶ 2 Defendant Albert Domagala appeals from the dismissal, on motion of the State, of his petition for post-conviction relief. On appeal, defendant contends that he is entitled to an evidentiary hearing because he made a substantial showing of ineffective assistance of trial counsel in that counsel failed to investigate the legitimate defense of gross negligence by medical staff, but instead advanced a "fruitless defense" with no hope of success. Defendant also

contends that appellate counsel was ineffective for failing to raise the issue of trial counsel's effectiveness and for failing to challenge his conviction on grounds of unforeseeability of the victim's death.

¶ 3 For the reasons that follow, we affirm.

¶ 4 Defendant's conviction arose from the death of 84-year-old Stanley Kugler, for whom defendant was a live-in caregiver. The underlying facts of the case appear in our order on direct appeal and will be repeated here only as necessary. In brief, on October 6, 2003, Kugler's neighbors, as well as a police officer they had called to the scene, witnessed defendant slapping Kugler and leaning or shoving his forearm into Kugler's neck. Kugler was taken to the hospital by paramedics, who placed a cervical collar on his neck. The next day, a speech pathologist conducted a swallowing test while Kugler was wearing the hard cervical collar and determined that Kugler had dysphagia, or difficulty swallowing. Doctors subsequently ordered a feeding tube, which Kugler pulled out several times over the next two weeks. On October 21, 2003, Kugler died at a nursing home as a result of infection caused by displacement of the feeding tube.

¶ 5 Following a bench trial, defendant was convicted of first degree murder and aggravated battery of a senior citizen, and was sentenced to concurrent prison terms of 40 and 10 years, respectively. We affirmed on direct appeal, rejecting defendant's contentions that his conviction for murder should have been reduced to involuntary manslaughter because he acted recklessly, as opposed to knowingly; that his 40-year sentence was excessive; and that his aggravated battery conviction should have been vacated because it arose from the same physical act as his murder conviction. *People v. Domagala*, No. 1-06-0317 (2007) (unpublished order under Supreme Court Rule 23).

¶ 6 In 2008, defendant filed an attorney-drafted post-conviction petition alleging ineffective assistance of trial and appellate counsel. Defendant argued that trial counsel had failed to investigate and discover evidence of gross negligence on the part of Kugler's treating medical staff. According to defendant's argument, the gross negligence occurred when a swallowing test was conducted on Kugler while he was wearing a hard cervical collar. Defendant argued that this gross negligence was an intervening and superceding cause of Kugler's death, disconnected from any act of defendant, that would relieve him of criminal liability. The petition asserted that counsel's failure precluded him from raising a "valid" defense to the charges against him. Defendant further argued in his petition that appellate counsel was ineffective for failing to raise the issue of causation, specifically, the argument that infection from a self-removed feeding tube was not a foreseeable result of defendant's acts.

¶ 7 Defendant attached two affidavits to his petition. The first was executed by Dr. David D. Caldarelli, who averred that in his medical opinion, defendant's actions did not produce sufficient trauma to Kugler to result in dysphagia. He further stated that because Kugler was wearing a cervical collar during the swallow study, the test results were unreliable. He stated, "Studies have shown that cervical bracing affects swallowing physiology in even normal healthy adults and, as such, swallow tests conducted on persons wearing cervical collars will provide unreliable results such as aspiration and skew to suggesting swallowing problems where none truly exist." Dr. Caldarelli opined that performing swallow testing on Kugler while he was wearing a cervical collar constituted gross negligence on the part of those persons who conducted the tests, and that insertion of a feeding tube premised on such testing constituted gross negligence as well.

¶ 8 The second affidavit was executed by defendant's trial counsel. In the affidavit, counsel stated that at no time during his representation did he conduct investigation into whether

Kugler's death was caused by his wearing of a hard cervical collar during swallow testing and whether the subsequent placement of a feeding tube based on such test results was gross medical negligence and the cause of Kugler's death. Counsel further stated that his failure to investigate was not based on any trial strategy.

¶ 9 The State moved to dismiss defendant's petition. Following argument, the trial court granted the motion.

¶ 10 On appeal, defendant contends that his petition should have advanced to an evidentiary hearing. In order to advance to an evidentiary hearing, a petition and its accompanying documentation must make a substantial showing of a violation of constitutional rights. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). Our review of the dismissal of a post-conviction petition on motion of the State is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

¶ 11 Defendant contends that he has made a substantial showing of ineffective assistance of trial counsel where counsel failed to investigate and present the legitimate defense of gross negligence by medical staff as an intervening and superceding cause of death, and instead, due to a misapprehension of the law, advanced a "fruitless defense" that was "doomed to fail," that is, the defense that defendant's actions did not cause Kugler's dysphagia. Defendant argues that counsel's conduct in this regard fell below an objective standard of reasonableness because the theory of an intervening cause was his best, and possibly only, viable theory of defense, and because the existing evidence of gross negligence would have prompted a reasonable attorney to at least investigate the issue.

¶ 12 Defendant asserts that he suffered prejudice as a result of counsel's actions because the proffered defense offered no opportunity for acquittal, the intervening cause defense would have had the potential to succeed, and counsel's failure to investigate and present a legitimate defense undermines confidence in the outcome of the case. Defendant argues that his petition raises a

question of fact concerning gross negligence that is primarily based on evidence outside the record, and that therefore, it was inappropriate for the court to dismiss the petition without an evidentiary hearing.

¶ 13 The standard for a claim of ineffective assistance of counsel has two prongs: deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 685 (1984). First, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. In order to establish this prong, the defendant must overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy. *People v. Smith*, 195 Ill. 2d 179, 188 (2000). Second, a defendant must establish prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. If a case may be disposed of on one *Strickland* prong, this court need not review the other. *People v. Irvine*, 379 Ill. App. 3d 116, 129-30 (2008).

¶ 14 We find that defendant has failed to establish the prejudice prong of the *Strickland* test. Even if counsel had investigated whether gross negligence by medical staff was an intervening and superceding cause of death and presented Dr. Caldarelli as a witness, we cannot say that the outcome of defendant's trial would have been different.

¶ 15 At trial, Dr. Aldo Fusaro, the medical examiner who autopsied Kugler, testified that he had an "issue" with the swallow study performed in this case. Dr. Fusaro stated that he did not know whether any studies had been conducted where patients were given successive swallow tests while wearing and then not wearing hard cervical collars, but that in his opinion, the presence of a collar could affect the outcome of such a test. In response to questioning by the trial court, Dr. Fusaro agreed that a patient who has trouble swallowing while wearing a collar

may not have such problems if not wearing such a collar. In contrast, Dr. Ajay Bajaj, a gastroenterologist, testified that it was proper procedure to perform a swallow study on Kugler while he was wearing a hard cervical collar. Dr. Bajaj explained that the procedure was proper because in general, Kugler "would have needed to swallow and wear the cervical collar both."

¶ 16 Had Dr. Caldarelli testified at trial consistent with his affidavit, his testimony would have been cumulative to Dr. Fusaro's and contradicted by Dr. Bajaj's. While the trial attorneys may not have crafted arguments using the term "gross negligence," the issue of the propriety of conducting a swallow study on Kugler while he was wearing a hard cervical collar was raised at trial. We are mindful that Dr. Caldarelli may have been able to add more detail on the topic. However, we cannot find that but for counsel's failure to investigate and present such testimony, there was a reasonable probability that the result of the trial would have been different.

¶ 17 Having found that defendant failed to establish the prejudice prong of the *Strickland* test, we need not address whether counsel's representation fell below an objective standard of reasonableness. Defendant's contention that his petition made a substantial showing of ineffective assistance of trial counsel fails.

¶ 18 Defendant next contends that his petition made a substantial showing of ineffective assistance of appellate counsel. Claims of appellate ineffectiveness are evaluated under the same *Strickland* standard used for assessing claims of ineffective assistance of trial counsel. *People v. Harris*, 206 Ill. 2d 1, 34 (2002). There is no requirement that appellate counsel raise every conceivable issue on appeal, and an attorney who refrains from briefing issues without merit is not incompetent. *Harris*, 206 Ill. 2d at 34. "[U]nless the underlying issues are meritorious, defendant has suffered no prejudice from counsel's failure to raise them on appeal." *Harris*, 206 Ill. 2d at 34.

¶ 19 Defendant contends that his appellate counsel was ineffective in two regards. First, he argues that appellate counsel was ineffective for failing to allege trial counsel's ineffectiveness for advancing a non-defense at trial and not raising the defense of gross negligence as an intervening and superceding cause of death. We have already rejected this allegation of ineffective assistance of trial counsel. Accordingly, defendant's contention that appellate counsel was ineffective for failing to raise the issue cannot succeed.

¶ 20 Second, defendant argues that appellate counsel was ineffective for failing to challenge his conviction based on the unforeseeability of Kugler's death. He argues that where the evidence established that he struck Kugler in the neck and Kugler died two weeks later from an abdominal infection, the cause of death was so obviously attenuated from his acts, and at such variance with his intended results, that he was not accountable for murder. Defendant asserts that any reasonable appellate counsel would have challenged his conviction on these grounds, and that because the issue had a reasonable probability of success, dismissal of the petition was improper.

¶ 21 In support his contention, defendant relies primarily on *People v. Hudson*, 222 Ill. 2d 392 (2006). In *Hudson*, the defendant was charged with felony murder pursuant to the "proximate cause" theory. *Hudson*, 222 Ill. 2d at 401. On appeal, he contended that the trial court improperly instructed the jury as to the causation element of felony-murder because the instruction did not refer to foreseeability. *Hudson*, 222 Ill. 2d at 399. Noting that the term "proximate cause" describes two distinct requirements -- cause in fact and legal cause -- and that legal cause is essentially a question of foreseeability, our supreme court stated that the relevant inquiry is " 'whether the injury is of a type that a reasonable person would see as a likely result of his or her conduct.' " *Hudson*, 222 Ill. 2d at 401, quoting *First Springfield Bank & Trust v. Galman*, 188 Ill. 2d 252, 258 (1999). However, the *Hudson* court also held that the word

"foreseeability" need not be used in an instruction to communicate the idea of proximate cause. *Hudson*, 222 Ill. 2d at 401. Rather, an instruction would be adequate if it communicated the definition of "proximate cause" as " '[any] cause which, in natural or probable sequence, produced the injury complained of' " or if it stated that a person commits first degree murder when "he sets in motion a chain of events which cause the death of an individual." *Hudson*, 222 Ill. 2d at 401, 406, quoting Illinois Pattern Jury Instructions, Civil, No. 15.01 (2005).

¶ 22 On direct appeal in the instant case, appellate counsel made the argument that defendant's conviction for murder should be reduced to involuntary manslaughter because he did not know that his actions created a strong probability of death or great bodily harm. In the course of affirming defendant's conviction, we noted that in order to sustain a conviction for knowing first-degree murder, the State need not prove that the defendant had the specific intent to kill or do great bodily harm, nor that he knew with certainty that his acts would cause someone to die, but only that the defendant willfully committed an act that has the natural tendency to end another's life. *Domagala*, No. 1-06-0317, slip op. at 15.

¶ 23 Given the arguments made and resolved on direct appeal, we cannot find that defendant suffered any prejudice from appellate counsel's failure to challenge his conviction using the term "foreseeability." In our view, the inquiry as to whether a defendant willfully committed an act that has the natural tendency to end another's life is sufficiently similar to an inquiry as to whether a person sets in motion a chain of events which cause the death of an individual so as to encompass the same intellectual concept. Had appellate counsel raised an issue using the term "foreseeabilty," we would have resolved it in the same manner as we resolved the issue that was actually presented. Defendant has not shown a reasonable probability that, but for counsel's failure to craft a challenge to his conviction using the terminology of foreseeability, the result of

the proceeding would have been different. Absent prejudice, defendant's contention of ineffective assistance fails.

¶ 24 Defendant has failed to make a substantial showing of a violation of constitutional rights. Accordingly, the trial court did not err in granting the State's motion to dismiss.

¶ 25 For the reasons explained above, we affirm the judgment of the circuit court of Cook County.

¶ 26 Affirmed.