

No. 2—09—0569
Order filed March 2, 2011

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Du Page County.
)	
Plaintiff-Appellee,)	
v.)	No. 08—CM—7077
)	
CRAIG S. STRAUSS,)	Honorable
)	Karen M. Wilson,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Hudson concurred in the judgment.

ORDER

Held: Defense counsel was not ineffective for failing to move to preserve a surveillance videotape; defendant failed to establish prejudice, as he merely speculated as to what the tape would have shown and how it would have affected the result of the proceedings.

At issue in this appeal is whether defense counsel was ineffective for various reasons stemming from counsel's failure to seek the preservation of an alleged surveillance videotape of defendant, Craig S. Strauss, interacting with police officers in the booking area of the police department. Because defendant has failed to establish what such a videotape would have depicted,

we conclude that defense counsel was not ineffective for failing to move to preserve the videotape. Thus, we affirm.

The facts necessary to resolve this appeal are as follows. On December 8, 2008, defendant was observed drinking in a parking lot. When the police attempted to effectuate defendant's arrest for this offense, defendant became belligerent and started fighting with the officers at the scene as well as at the police department. As a result, defendant was charged with, among other things, two counts of battery (720 ILCS 5/12—3(a)(2) (West 2008)). One of the counts concerned defendant kicking Officer Matthew Riedel in the leg while the police attempted to process defendant at the police department.

At trial, Riedel and Officer Dan Kosartes testified that defendant kicked Riedel in the leg numerous times while the police were trying to fingerprint defendant and photograph him for booking purposes. Evidence presented at trial also revealed that surveillance video of the processing area is taken whenever there is activity there and that the surveillance tape recycles every 30 or 45 days. The evidence did not reveal whether the surveillance video of defendant in the processing room was available for review.

Defense counsel never filed a motion to preserve any surveillance video taken of defendant in the processing area. Rather, defense counsel emphasized at trial that no video of the police processing defendant was ever presented. Based on that position, counsel unsuccessfully sought a jury instruction that would have permitted the jury to infer, if it found that various facts existed, that the surveillance video would have shown that defendant did not kick Riedel.¹

¹During the early stages of the proceedings, defendant sought to retain a private attorney to represent him. When he was unable to retain private counsel, an assistant public defender was

The jury found defendant guilty of two counts of battery. Defendant subsequently was sentenced to 24 months of probation and 180 days in jail. Following the denial of his motion for a new trial, defendant timely appealed.

As noted, at issue in this appeal is whether defendant's trial counsel was ineffective for various reasons stemming from her failure to move to preserve an alleged surveillance videotape of defendant in the processing area of the police department. We review defendant's claim *de novo*, as the facts surrounding the ineffective assistance claim are undisputed and the issue was not raised in the trial court. *People v. Wilson*, 392 Ill. App. 3d 189, 197 (2009).

In reviewing defendant's claim, we are guided by *Strickland v. Washington*, 466 U.S. 668 (1984). Under the two-prong *Strickland* test, a defendant claiming ineffective assistance of counsel must show that his counsel's performance "fell below an objective standard of reasonableness" and that the deficient performance was prejudicial in that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688, 694. "If it is easier to dispose of an ineffective assistance claim on the ground that it lacks sufficient prejudice, then a court may proceed directly to the second prong and need not determine whether counsel's performance was deficient." *People v. Givens*, 237 Ill. 2d 311, 331 (2010).

In deciding whether a defendant was prejudiced, *i.e.*, whether there is a reasonable probability that, but for counsel's alleged errors, the result would have been different, courts consider whether

appointed to represent him. The assistant public defender was appointed on January 23, 2009, which was 46 days after defendant was arrested. Assuming that the surveillance videotape was recycled every 45 days at the most, counsel may have had no choice but to proceed the way she did, because there was no surveillance videotape of which she could seek preservation.

there is a probability sufficient to undermine confidence in the outcome. *People v. Graham*, 206 Ill. 2d 465, 476 (2003). This probability “requires actual prejudice be shown, not mere speculation as to prejudice.” *People v. Bew*, 228 Ill. 2d 122, 135 (2008). Thus, where a defendant’s ineffective assistance claim rests solely on conjecture as to how his case may or may not have proceeded had defense counsel taken a different tactic, courts must find that counsel was not ineffective. *Id.* at 135-36; see also *People v. Howard*, 130 Ill. App. 3d 967, 977-78 (1985) (the defendant’s claim that his trial counsel was ineffective for failing to move to preserve blood samples taken from murder scene was unfounded, because, among other things, the defendant’s claim that his own expert would have tested those samples and may have reached conclusions helpful to the defense was mere speculation).

Although neither the parties nor this court found an Illinois case directly on point, we did locate *Ex parte Ramirez*, 280 S.W.3d 848 (Tex.Crim.App. 2007), which is persuasive here. In *Ramirez*, the evidence supporting the defendant’s burglary conviction revealed that the defendant broke into a woman’s home and stole her purse, which contained her credit card. *Id.* at 849-50. A surveillance video from a nearby convenience store, taken shortly after the burglary, allegedly showed someone other than the defendant using the stolen credit card. *Id.* at 850. Defense counsel did not introduce the surveillance videotape into evidence, and, as a result, the defendant claimed that counsel was ineffective. *Id.* at 850-51. Although the trial court found the defendant’s claim meritorious, the reviewing court did not. *Id.* at 852-53. In determining that counsel was not ineffective for failing to review the videotape or introduce it into evidence, the court observed that the defendant did not establish that the videotape did not show him using the victim’s credit card. *Id.* at 853. Indeed, the court had no idea what, if anything, the videotape depicted. *Id.* at 853-54. Without knowing what the videotape would reveal, the court concluded that the defendant failed to

demonstrate that he was prejudiced by counsel's failure to review the tape or offer it into evidence. *Id.* at 854.

Here, like in *Ramirez*, defendant's claim that counsel was ineffective for various reasons stemming from counsel's failure to move to preserve the alleged surveillance videotape is unfounded, because defendant has failed to establish actual prejudice. To establish actual prejudice, defendant needed to specify what the videotape would have revealed. For example, defendant needed to assert that he did not kick Officer Riedel, that the videotape would have supported that conclusion, and that, as a result, his counsel was ineffective for failing to move to preserve the videotape. Instead of making this type of assertion, defendant claims that, had counsel sought preservation of the videotape, "the surveillance video *could have lead* [sic] [defendant] to believe [that] the evidence against him was overwhelming." (Emphasis added.) Under such circumstances, defendant contends that "[t]he Public Defender *could have counseled* [defendant] that the case against him was strong and he should consider entering into plea negotiations." (Emphasis added.) Defendant then acknowledges that, "[o]n the other hand, the [surveillance videotape] *could have portrayed* a different version of events" than that to which the officers testified. (Emphasis added.) As this court has noted before, contentions like defendant's, of what could have happened had counsel proceeded in a different manner, are insufficient to support a claim that counsel was ineffective. See *People v. Giampaolo*, 385 Ill. App. 3d 999, 1003 (2008) (the defendant's claim that he "*might not have pleaded guilty*" but for his attorneys' errors was insufficient to establish actual prejudice; to establish actual prejudice, the defendant needed to allege that "he would not have pleaded guilty and would have insisted on proceeding with a trial if not for his attorneys' errors" (Emphasis in original.)). Because defendant has failed to allege how, if at all, he was *actually*

prejudiced by counsel's actions, we cannot conclude that counsel was ineffective for various reasons stemming from her failure to move to preserve the surveillance videotape.

For these reasons, the judgment of the circuit court of Du Page County is affirmed.

Affirmed.