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2011 IL App (3d) 090513-U

Order filed November 3, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Circuit Court
	) of the 21st Judicial Circuit,
	) Kankakee County, Illinois,
Plaintiff-Appellee,	)
	) Appeal No. 3–09–0513
v.	) Circuit No. 99–CF–338
	)
TERRANCE D. HAYNES,	) Honorable
	) Kathy Elliott,
Defendant-Appellant.	) Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Schmidt and McDade concurred in the judgment.

ORDER

¶ 1 *Held*: The denial of the defendant's motion for a new trial, after his first degree murder conviction, was upheld on appeal because the defendant failed to show that his trial counsel's decisions not to call two eyewitnesses based upon the substance of their police statements and perceived lack of credibility was objectively unreasonable.

¶ 2 After a jury trial, the defendant, Terrance D. Haynes, was convicted of first degree murder and sentenced to 45 years in prison. The defendant filed a *pro se* posttrial motion alleging ineffective assistance of counsel, which was denied by the trial court. On appeal, we

reversed the trial court's judgment and remanded to the trial court for further consideration of the defendant's claim of ineffective assistance. *People v. Haynes*, 331 Ill. App. 3d 482 (2002). Upon remand, the defendant retained new counsel and filed a motion for a new trial. After a hearing, the trial court denied the motion, and it denied the subsequent motion for reconsideration. The defendant appealed, and we affirm.

¶ 3 FACTS

¶ 4 The facts are more fully recounted in our prior opinion. On May 27, 1999, the defendant shot the victim, Cezaire Murrell, on the front porch of the home of the defendant's friend, Gary Hammond Jr. A number of people were present, although only a few people actually saw the shooting. Gary's11-year-old brother, Marcus Hammond, testified for the prosecution. Marcus testified that he was on the porch, but he went out onto the sidewalk in front of the house after Murrell came up on to the porch. When Marcus was at the end of the sidewalk, he saw the defendant pull a gun from the back of his body as Murrell moved toward the defendant, and Marcus saw the defendant shoot Murrell twice. Marcus testified that he did not see Murrell holding a gun. According to Marcus, Murrell rolled down the porch stairs, and the defendant followed and stood over and pointed a gun at Murrell's head.

¶ 5 The defendant testified that Murrell walked up to the porch, asked him for money, and threatened to hit the defendant when he refused. When a friend tried to get Murrell to leave, the defendant said that Murrell lifted his shirt and revealed a gun in his waistband. The defendant then picked up a gun that was on the porch underneath a shirt and put it in his back pocket. The defendant testified that Murrell then rushed up the porch steps, with one hand on his gun in his waistband and one had reaching for the defendant. The defendant testified that he was scared, so

he pulled out the gun from his back pocket, closed his eyes, and started shooting. The defendant then ran away, leaving both the gun he used in the shooting and Murrell's gun behind. No guns were recovered from the scene.

¶ 6 At the jury instruction conference, the defendant, against his attorney's advice, declined to have the jury instructed on second degree murder. The defendant was thereafter convicted of first degree murder. At the sentencing hearing, the defendant claimed that his trial counsel was ineffective for failing to interview and call certain witnesses. The trial court held on a hearing on the claim, but declined to appoint new counsel for the defendant, finding that the claims were matters of trial strategy. On appeal, we reversed. We found that the defendant's allegations suggested possible neglect, but it was likely that those allegations could be readily proved or disproved by the police reports that were not provided to the trial court for review. We remanded with instructions to the trial court to review the reports, and anything else it deemed necessary, to determine if the evidence indicated possible neglect.

¶ 7 On remand, new counsel was appointed to represent the defendant, but that counsel was replaced with private counsel retained by the defendant. The newly-retained counsel filed a motion for a new trial, alleging that trial counsel rendered ineffective assistance of counsel. Specifically, the motion alleged that trial counsel was ineffective for failing to interview and call certain witnesses at the defendant's trial and trial counsel failed to talk to the defendant about his case. At the hearings on the motion, the trial court was provided with copies of several police statements, including one by Darryl Haynes and two by Gary Hammond, Jr.

¶ 8 The defendant testified that he sent a list of at least 10 witnesses to his trial counsel, but trial counsel never contacted those witnesses. When the trial court asked the defendant to name

the witnesses, he named five: Darryl, Gary, Lance Crowell, Jackie Speed, and Toya Williams. Trial counsel responded that he reviewed the State's discovery materials 15 to 20 times before trial. Trial counsel testified that he did not interview Darryl or Gary before trial, but he did review their statements to police. He recalled that Gary was in federal custody on drug charges at the time of trial, and he thought that Darryl was also in jail. He also recalled that the defendant had told him that Crowell, Speed, and Williams could not testify to the shooting. Trial counsel testified that his strategy was to present second degree murder and self-defense to the jury. He considered calling Gary and Darryl, but felt they would not be perceived as credible and they would further damage the defendant's case. Not only was Gary in federal custody, his police report indicated that Murrell first sought to shake hands with the defendant, and Gary did not see Murrell's gun until Murrell pulled it out after being shot by the defendant. Also, Gary indicated that, after shooting Murrell, the defendant stood over Murrell and aimed his gun at Murrell's head.

¶ 9 Trial counsel acknowledged that the police statement by Darryl indicated that Murrell had a gun, but trial counsel believed that Darryl would indirectly contradict the defendant's story, and that the jury would negatively perceive Darryl because Darryl was the defendant's cousin and was in state custody. At the defendant's trial, trial counsel fully cross-examined the State's witnesses.

¶ 10 The defendant and trial counsel agreed that they had met in person and spoke on at least three occasions prior to trial. Trial counsel stated that he had discussed his trial strategy with the defendant, which was to present enough evidence for a second degree murder instruction and to argue self-defense. Trial counsel stated that it was a matter of trial strategy not to call further

witness regarding a prior incident between the defendant and Murrell because trial counsel did not want the shooting to look like it was done in revenge.

¶ 11 The trial court denied the defendant's motion for a new trial. The trial court reviewed the police reports that were available to trial counsel prior to the defendant's trial, concluding that trial counsel had all the witness statements prior to trial so he knew what each witness would testify to. Further, the discovery material indicated that Gary and Darryl were the only two witnesses that gave statements who were actually present at the time of the shooting. The trial court found that the testimony of all the witnesses, including the defendant, was consistent: the defendant shot Murrell twice before Murrell pulled his gun from his waistband. Given this evidence, trial counsel introduced all possible defenses and trial counsel's strategies were reasonable. Also, the trial court found that trial counsel had met with the defendant at least three times prior to trial, and they had discussed self-defense and second degree murder instructions. Further, the trial court found that the defendant failed to show that he suffered any prejudice.

¶ 12 The defendant appealed, and then filed a motion to reconsider. This court granted the defendant's motion to remand the cause to the trial court for consideration of the motion to reconsider. The trial court denied the motion to reconsider, and this appeal followed.

¶ 13 ANALYSIS

¶ 14 The defendant argues that trial counsel's failure to interview and present the testimony of two eyewitnesses who could have corroborated the defendant's testimony that Murrell had a gun was ineffective assistance of counsel. The defendant also argues that there was a reasonable probability that he would have agreed to a second degree murder instruction if the two witnesses had testified, and he would have been found guilty of the lesser offense. The State argues that

the defendant's claim that his trial counsel rendered ineffective assistance of counsel is meritless because trial counsel conducted a reasonable investigation and made reasonable decisions based on trial strategy. In addition, the State argues that the defendant cannot establish a reasonable probability that even if trial counsel had interviewed and called the two witnesses that the defendant would have been acquitted of first degree murder or would have agreed to a second degree murder jury instruction.

¶ 15 To establish a claim for ineffective assistance of counsel, a defendant must show that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) counsel's representation prejudiced the defendant's case. *Strickland v. Washington*, 466 U.S. 668 (1984). Under the first prong, the reviewing court must give deference to counsel's conduct within the context of the trial and without the benefit of hindsight. *People v. King*, 316 Ill. App. 3d 901, 913 (2000). As such, the defendant must overcome a strong presumption that counsel's action or inaction was the result of sound trial strategy. *People v. Houston*, 226 Ill. 2d 135, 144 (2007). Under the second prong, the defendant must show that, but for counsel's deficient representation, there is a reasonable probability that the outcome of the trial would have been different. *Houston*, 226 Ill. 2d at 144. A reasonable probability is one that is sufficient to undermine confidence in the outcome. *Houston*, 226 Ill. 2d at 149. Both *Strickland* prongs involve mixed questions of law and fact; we defer to the trial court's factual findings and review *de novo* the legal conclusions. *People v. Davis*, 353 Ill. App. 3d 790, 794 (2004).

¶ 16 We find that trial counsel's decisions with regard to Gary and Darryl were objectively reasonable within the context of the trial. A defendant is entitled to competent representation, not perfect representation. *People v. Garcia*, 405 Ill. App. 3d 608, 617 (2010). Trial counsel

reviewed the police statements of both, and he compared them to the other statements and the defendant's version of the events. Trial counsel assessed which witnesses would best serve his strategy of second degree murder and self-defense. Trial counsel's decisions regarding Gary and Darryl, after considering the effect on their credibility with the jury since they were in police custody on criminal charges and considering that their versions of the events would partly contradict or fail to corroborate the defendant's testimony, were reasonable matters of trial strategy. We defer to the trial court's factual finding that trial counsel met with the defendant before trial and discussed with the defendant self-defense and second degree murder instructions. Viewing trial counsel's performance as a whole, the defendant cannot overcome the strong presumption that he received constitutionally adequate counsel.

¶ 17 Since we find that trial counsel's representation did not fall below an objective standard of reasonableness, we need not reach the issue of prejudice. We affirm the trial court denial of the defendant's motion for a new trial.

CONCLUSION

¶ 18 The judgment of the circuit court of Kankakee County is affirmed.

¶ 19 Affirmed.