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No. 3--09--0363

Order filed April 4, 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 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,	)	
v.	)	No. 00--CF--785
RICKIE SANDERS,	)	Honorable Michael E. Brandt,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices McDade and Schmidt concurred in the judgment.

ORDER

Held: The defendant forfeited his claim in his postconviction petition that his trial counsel was ineffective for failing to tender jury instructions on reckless conduct because he did not raise the issue at his *Krankel* hearing or on direct appeal. In addition, trial counsel's failure to consult with the defendant or tender a jury instruction for reckless conduct was not objectively unreasonable because there was no evidence in the record to support such an instruction.

The defendant, Rickie Sanders, filed an amended postconviction petition alleging that he was denied effective

assistance of trial counsel, *Krankel* counsel (*People v. Krankel*, 102 Ill. 2d 181 (1984)), and appellate counsel. The trial court dismissed the petition, finding that the defendant's claims were barred by *res judicata* or did not merit an evidentiary hearing. We affirm.

FACTS

The instant case arose out of an altercation between the defendant and his former girlfriend, Jeanelle Raspberry, that occurred on August 29, 2000. During that dispute, Raspberry was cut with a knife. At trial, she testified that the defendant attacked her and struck her three times on the head and eight times on the body with the knife. In contrast, the defendant testified that Raspberry initially had possession of the knife and that he acted in self-defense. The defendant claimed that Rasberry's injuries occurred during the struggle for possession of the knife.

The jury received instructions on attempted first degree murder, armed violence, aggravated domestic battery, and aggravated battery. No instructions were given regarding the lesser-included offense of reckless conduct. The defendant was convicted of armed violence, aggravated domestic battery, and two counts of aggravated battery. At his sentencing hearing, the defendant expressed discontent with the performance of his trial counsel. He was sentenced to 17 years in prison.

On direct appeal, this court vacated the convictions for aggravated domestic battery and aggravated battery and remanded this matter to the trial court for further proceedings concerning the defendant's allegations that he received ineffective assistance of counsel at trial. *People v. Sanders*, No. 3--01--0074 (2002) (unpublished order under Supreme Court Rule 23). The defendant had a *Krankel* hearing on April 2, 2003, and he was represented by new counsel. The court informed the defendant that this hearing was his opportunity to raise all claims of ineffective assistance of counsel. In addition, during the hearing the defendant was asked twice by the trial court if he had any other grievances against his trial counsel. After the defendant acknowledged that he could not think of any other errors committed by his trial counsel, his claims were dismissed. The dismissal was affirmed by this court after the defendant's appellate counsel filed a motion in accordance with *Anders v. California*, 386 U.S. 738 (1967). *People v. Sanders*, No. 3--03--0325 (2004) (unpublished order under Supreme Court Rule 23).

Meanwhile, the defendant filed his *pro se* postconviction petition on November 20, 2003. His petition has been amended several times, with the most recent version filed on December 2, 2008. In that petition, the defendant realleged several of the same claims he made at his *Krankel* hearing and also alleged new errors, including that his original trial counsel was ineffective

for failing to tender jury instructions regarding reckless conduct. The trial court dismissed the defendant's amended postconviction petition, and he appealed.

ANALYSIS

The defendant argues that his trial counsel was ineffective because she failed to consult with the defendant or tender jury instructions on reckless conduct at trial. The defendant also argues that his *Krankel* and appellate counsel were ineffective for failing to raise this issue at earlier proceedings. We review *de novo*. *People v. Coleman*, 183 Ill. 2d 366 (1998).

First, we must address the State's argument that the defendant waived his claim to ineffective assistance of trial counsel. Our supreme court recently clarified the difference between waiver and forfeiture in *People v. Phipps*, 238 Ill. 2d 54 (2010); see also *People v. Blair*, 215 Ill. 2d 427 (2005) (describing the difference between waiver, forfeiture, and procedural default). The court stated that "[w]hile forfeiture applies to issues that could have been raised but were not, waiver is the voluntary relinquishment of a known right." *Phipps*, 238 Ill. 2d at 62. In addition, waiver principles are to be liberally construed in favor of the defendant. *Phipps*, 238 Ill. 2d 54. Construed liberally, it cannot be said that the defendant waived his current claim because there is no indication that he knowingly gave up his claim to ineffective assistance of

counsel based on a failure to tender jury instructions for a lesser-included offense.

Nonetheless, it is assumed that the State did not waive the affirmative defense of forfeiture. See *Blair*, 215 Ill. 2d at 456 (stating "the State has not indicated that it wishes to forgo the affirmative defenses of *res judicata* and forfeiture on appeal"). When a claim could have been raised in an earlier proceeding, and was not, it is forfeited. *Blair*, 215 Ill. 2d 427; see also *People v. Harris*, 224 Ill. 2d 115 (2007) (stating that any constitutional issues that could have been raised prior to postconviction proceedings, and were not, are procedurally defaulted).

The record reveals that the defendant had several opportunities to convey his displeasure concerning his trial counsel's failure to tender jury instructions for reckless conduct. The first was at the defendant's *Krankel* hearing, where the trial court put him on notice that this was his opportunity to address all of his complaints against his trial counsel. At the hearing, the defendant made several complaints about his trial counsel, but he did not complain about his trial counsel's failure to tender a reckless conduct instruction. The defendant's second opportunity occurred when he appealed the trial court's dismissal of his ineffective assistance of counsel claims after the *Krankel* hearing. Instead of raising the issue

of jury instructions in that appeal, the defendant's counsel filed an *Anders* brief stating that there were no meritorious claims for appeal. *Anders*, 386 U.S. 738. This court affirmed the dismissal. *Sanders*, No. 3--03--0325.

Having held that the defendant forfeited his claim to ineffective assistance of trial counsel, the issue now becomes whether he received ineffective assistance of counsel at his *Krankel* hearing or on appeal. If the defendant was represented by incompetent counsel at these proceedings, then the rules of forfeiture do not apply. See *Blair*, 215 Ill. App. 2d 427. The defendant has alleged that both his *Krankel* counsel and his appellate counsel were ineffective.

In order for the defendant to prevail on an ineffective assistance of counsel claim, he must establish that the representation he received fell below an objective standard of reasonableness and that, but for these errors, a reasonable probability exists that the results of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). Because the first step of the *Strickland* test requires us to evaluate whether the defendant's *Krankel* counsel or appellate counsel were unreasonable for failing to raise the issue of jury instructions, we proceed to the merits of his claim.

As stated above, the defendant argues that his trial counsel was ineffective for failing to tender instructions for the

lesser-included offense of reckless conduct. A criminal defendant has a personal right to request an instruction on a lesser-included offense if the evidence would permit a jury to rationally find him guilty of the lesser offense. *Keeble v. United States*, 412 U.S. 205 (1973); *People v. Brocksmith*, 162 Ill. 2d 224 (1994). While a defendant is entitled to any instruction that is supported by the evidence, he is not allowed to demand an unlimited amount of instructions. *People v. Bratcher*, 63 Ill. 2d 534 (1976). When the evidence presented at trial indicates that the defendant acted intentionally and knowingly throughout the incident, instructions on reckless conduct should be refused. *People v. Varela*, 194 Ill. App. 3d 364 (1990).

We have previously held that reckless conduct is a lesser-included offense of aggravated battery. *People v. Willis*, 170 Ill. App. 3d 638 (3d Dist. 1988). At the time of the incident, a defendant acted recklessly when he consciously disregarded a substantial and unjustifiable risk and such disregard constituted "a gross deviation from the standard of care which a reasonable person would exercise in the situation." 720 ILCS 5/4--6 (2000). The defendant claims that, based on the evidence presented at trial, a reasonable jury could have found him guilty of reckless conduct because he allegedly defended himself in a reckless manner and thereby injured Rasberry.

We disagree with this assertion. Throughout trial, the defendant argued a case of self-defense. Our review of the record indicates that the defendant, according to his own description of his actions, knowingly attempted to take the knife away from Rasberry. While it is true that he claims Rasberry's injuries were accidental, there is nothing to indicate that he consciously disregarded a substantial and unjustifiable risk to Rasberry. Instead, his testimony illustrates that he knowingly and intentionally engaged in a struggle for possession of the knife.

The defendant cites *Willis*, 170 Ill. App. 3d 638, in support of his position that he was entitled to an instruction on reckless conduct. In *Willis* the defendant injured a public safety officer during a struggle where the defendant was "wild and flailing about." *Willis*, 170 Ill. App. 3d at 639. Specifically, some of the evidence at trial established that when defendant tried to escape the public safety officer he was caught by a bystander and put in a full nelson hold. *Willis*, 170 Ill. App. 3d 638. The defendant then kicked the officer in the groin while he was attempting to escape the full nelson hold. *Willis*, 170 Ill. App. 3d 638.

This case is distinguishable from *Willis* because Rasberry's accidental injuries did not occur while the defendant was wildly trying to escape, but instead resulted from his deliberate

decision to defend himself. We believe the instant case is more analogous to *People v. Cathey*, No. 1--09--0112, 2010 WL 5166390 (Ill. App. Dec. 16, 2010). In *Cathey*, the defendant claimed that he was acting in self-defense while he was struggling for possession of a gun. *Id.* According to the defendant, the gun accidentally misfired and caused the victim's death. *Id.* The court held that the defendant was not entitled to a reckless conduct instruction because his testimony did not show that he disregarded a substantial and unjustifiable risk by struggling with the victim for the gun. *Id.* Similarly, here we cannot say that the defendant's testimony demonstrated that he acted recklessly by struggling with Rasberry for the knife since he was purporting to act in self-defense. Since there was no evidence in the record to support a reckless conduct instruction, trial counsel's failure to consult with the defendant or submit such an instruction was not objectively unreasonable.

Even assuming, *arguendo*, that there was some evidence to support an instruction of reckless conduct, we would still hold that trial counsel's decision not to submit such an instruction was reasonable. To explain, criminal defendants making an ineffective assistance of counsel claim must overcome the strong presumption that the challenged decision is a result of trial strategy. *People v. Giles*, 209 Ill. App. 3d 265 (1991). A trial counsel's choice of jury instructions is usually considered a

matter of trial strategy. *People v. Bobo*, 375 Ill. App. 3d 966 (2007).

The defendant has not demonstrated that trial counsel's failure to tender a jury instruction on reckless conduct was objectively unreasonable. At most, he alleges there is a "risk" the jury found him guilty of a more serious offense because it had no other option. However, more is required to find trial counsel's decision unreasonable. Indeed, it is just as likely that trial counsel did not offer a reckless conduct instruction because doing so could have "converted a likely acquittal into a likely conviction." *Cathey*, 2010 WL 5166390 at *7.

Consequently, we conclude that trial counsel's decision not to consult with the defendant or tender jury instructions regarding reckless conduct was reasonable and, as a result, the defendant's *Krankel* and appellate counsel were not ineffective for failing to address the issue at an earlier proceeding.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court of Peoria County is affirmed.

Affirmed.