

NOTICE
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2011 IL App (4th) 100073-U

Filed 12/23/11

NO. 4-10-0073

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Sangamon County
THOMAS L. UMPHREY,)	No. 98CF1043
Defendant-Appellant.)	
)	Honorable
)	John W. Belz,
)	Judge Presiding.

JUSTICE McCULLOUGH delivered the judgment of the court.
Justices Cook and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant did not invoke his fifth-amendment right to counsel in the context of an interrogation when he asked to call his newly appointed lawyer upon returning to jail from an extradition proceeding, and thus subsequent initiation of questioning by police officers did not violate defendant's right to counsel.

¶ 2 On December 10, 2009, the Sangamon County circuit court dismissed the amended postconviction petition of defendant, Thomas L. Umphrey, following a second-stage nonevidentiary hearing. Defendant appeals, arguing he made a substantial showing that the trial court erred by dismissing his petition because his trial counsel provided ineffective assistance of counsel. Specifically, defendant argues his trial counsel failed to file a motion to suppress defendant's confession obtained after defendant invoked his fifth-amendment right to counsel.

We affirm.

¶ 3 On November 19, 1998, a grand jury indicted defendant for seven counts of first

degree murder (720 ILCS 5/9-1(a)(1), (a)(2), (a)(3) (West 1998)), aggravated kidnapping (720 ILCS 5/10-2(a)(5) (West 1998)), aggravated vehicular hijacking (720 ILCS 5/18-4(a)(3) (West 1998)), and unlawful possession of a stolen motor vehicle (625 ILCS 5/4-103(a)(1) (West 1998)).

¶ 4 On June 15, 2000, a jury convicted defendant of first degree murder (720 ILCS 5/9-1(a)(1) (West 1998)), aggravated kidnapping (720 ILCS 5/10-2(a)(5) (West 1998)), and aggravated vehicular hijacking (720 ILCS 5/18-4(a)(3) (West 1998)). On August 25, 2000, the trial court sentenced defendant to death on the murder conviction, and the sentence was stayed pending defendant's direct appeal. Ill. Const. 1970, art. VI, § 4(b); 720 ILCS 5/9-1 (West 1998); Ill. S. Ct. R. 603 (eff. July 1, 1971). The court sentenced defendant to 30 years in prison on each of the other two convictions, to be served concurrently. Thereafter, on January 10, 2003, then-Governor George Ryan commuted defendant's death sentence to a sentence of imprisonment for natural life. By order, the Supreme Court of Illinois transferred defendant's appeal to this court. This court affirmed on direct appeal. *People v. Umphrey*, No. 4-04-0141 (June 4, 2004) (unpublished order under Supreme Court Rule 23).

¶ 5 On July 21, 2009, defendant filed an amended postconviction petition pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 through 122-8 (West 2008)). Defendant alleged his trial counsel provided ineffective assistance of counsel because his trial counsel failed to file a motion to suppress defendant's confession obtained after defendant invoked his fifth- amendment right to counsel. The lengthy and detailed factual assertions related to this claim will be discussed as necessary in our analysis.

¶ 6 In a written order dated December 10, 2009, the trial court dismissed defendant's

amended petition finding he made no substantial showing of a constitutional violation.

¶ 7 This appeal followed.

¶ 8 We review the trial court's dismissal of a postconviction petition without an evidentiary hearing *de novo*. *People v. Hall*, 217 Ill. 2d 324, 334, 841 N.E.2d 913, 920 (2005). Dismissal is warranted at the second stage where the defendant's claims, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. *Hall*, 217 Ill. 2d at 334, 841 N.E.2d at 920. At that stage, the defendant's factual allegations not rebutted by the trial record are taken as true. *Hall*, 217 Ill. 2d at 334, 841 N.E.2d at 920.

¶ 9 The evidence shows that on November 11, 1998, defendant took a handgun with him to "get help" for his abandoned vehicle, a 1979 Ford pickup truck. Defendant stopped to change a tire for the victim, who was traveling alone. The victim drove a white Buick Skylark. Defendant told the victim to proceed to a restricted area when she was proceeding to a rest stop. He then told her to get out because he needed the car.

¶ 10 Jason Otholt, a Canadian Customs inspector, testified that on November 12, 1998, a car containing two black females attempted to enter Canada. While Inspector Otholt was questioning the women, he noticed that someone was in the backseat of the car behind some garbage bags. Inspector Otholt asked the white male in the backseat to show himself, and then he referred the three individuals to Canadian Immigration. Deputy Douglas Rude testified that he was employed by the Cook County sheriff's department in Minnesota. Rude checked the VIN vehicle identification number of the white Buick Skylark that was at the border and was informed that it had been reported missing; the license plate on the Buick was actually registered to a 1979 Ford pickup truck. Rude arrested the three individuals and transported them to the

Cook County, Minnesota, jail.

¶ 11 In a Minnesota extradition proceeding on November 13, 1998, Judge Kenneth Sandvik told defendant that he was charged as a fugitive from justice, in that he was wanted by authorities in another jurisdiction, specifically Missouri. Judge Sandvik told defendant he had the right to a lawyer, and offered to appoint counsel. Defendant indicated his desire to "talk with an attorney about this matter." Judge Sandvik appointed Stephen Coz to represent defendant and provided defendant Coz's phone number.

¶ 12 Lieutenant Tom Bowman testified that he and Detective Tim Young traveled to Minnesota to question defendant on November 14, 1998. Defendant waived his *Miranda* rights. *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966). Defendant stated that after the victim got out of the car, he shot her while she was looking in a different direction. Defendant drew a map to show the location of the body.

¶ 13 Officer Doug Williamson participated in the search for the victim on November 14, 1998. Williamson testified that her body was found near the dam at Lake Springfield. The pathologist said that the cause of death was a single gunshot wound to the head.

¶ 14 On July 12, 2005, a Missouri trial court conducted a hearing on defendant's motion to suppress evidence and motion to suppress statements involving the murder of Gerry Eichschlag on November 5, 1998. Defendant testified that after the Minnesota extradition proceeding on November 13, 1998, he was returned to the jail where he asked to use the phone to call his newly appointed lawyer. Defendant testified that he "requested to use the phone then and call that number." According to defendant, he was told he "wouldn't be able to use the phone until after [he] talked to the deputies."

¶ 15 Defendant argues he substantially showed he received ineffective assistance of counsel because his trial counsel failed to file a motion to suppress defendant's confession obtained after defendant invoked his fifth-amendment right to counsel. Defendant argues his fifth-amendment right attached when he asked to call his newly appointed counsel following the extradition proceeding on November 13, 1998, thus rendering any questioning after that point violative of his fifth-amendment right to counsel.

¶ 16 In *Miranda*, the Supreme Court held that before any custodial interrogation, police must advise a person of his right to have counsel present during the interrogation. The court also held that if the person at any point indicates that he wishes to speak with an attorney, the questioning must cease until he has had a chance to do so. *Miranda*, 384 U.S. at 444-45, 16 L. Ed. 2d at 707, 86 S. Ct. at 1612; *Edwards v. Arizona*, 451 U.S. 477, 484-85, 68 L. Ed. 2d 378, 386, 101 S. Ct. 1880, 1885 (1981). The accused may reinitiate questioning on his own and waive his right to counsel for that interrogation. *Edwards*, 451 U.S. at 484-85, 68 L. Ed. 2d at 386, 101 S. Ct. at 1885. If he has done neither of those things, then the questioning violates his fifth amendment right to counsel. *McNeil v. Wisconsin*, 501 U.S. 171, 176-77, 115 L. Ed. 2d 158, 167, 111 S. Ct. 2204, 2208 (1991). This rule is not offense-specific. *McNeil*, 501 U.S. at 177, 115 L. Ed. 2d at 163, 111 S. Ct. at 2208. Triggering the rule "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police." (Emphasis omitted.) *McNeil*, 501 U.S. at 178, 115 L. Ed. 2d at 163, 111 S. Ct. at 2209. Also, the person must invoke his right to counsel in the context of a "custodial interrogation," either ongoing or impending. *McNeil*, 501 U.S. at 179, 115 L. Ed. 2d at 164, 111 S. Ct. at 2209. He cannot invoke the right anticipatorily

outside of this context. *McNeil*, 501 U.S. at 181-82, 115 L. Ed. 2d at 171, 111 S. Ct. at 2211.

¶ 17 Whether defendant invoked his right in the context of an interrogation is the issue here. It is not disputed that he was in custody. Defendant asked to call his newly appointed lawyer upon returning to jail from the extradition proceeding on November 13, 1998. Judge Sandvik told defendant that the lawyer was to represent him for the matter of extradition. Defendant's request does not indicate a desire for an attorney in the context of questioning, but appears to be what followed from the fact that Judge Sandvik gave defendant his newly appointed counsel's phone number. From the record, there is no reason that defendant should have anticipated further questioning upon returning from court. Therefore, any subsequent initiation of questioning by the police on November 14, 1998, was not a violation of defendant's fifth- amendment right to counsel. Further, defendant waived his *Miranda* rights before each subsequent interrogation.

¶ 18 A criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 80 L. Ed. 2d 674, 692, 104 S. Ct. 2052, 2063 (1984). A defendant claiming ineffective assistance of counsel must demonstrate that (1) counsel's performance fell below an objective standard of reasonableness and (2) a reasonable probability exists that, but for the deficient performance, the outcome of the proceedings would have been different. *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693, 104 S. Ct. at 2064; *People v. Buss*, 187 Ill. 2d 144, 212-13, 718 N.E.2d 1, 39 (1999). If a reviewing court finds that a defendant suffered no or *de minimus* prejudice, it need not decide whether counsel's performance was constitutionally deficient. *Buss*, 187 Ill. 2d at 213, 718 N.E.2d at 39.

¶ 19 The decision to file a motion to suppress is a matter of trial strategy, and counsel's

decision will be accorded great deference. *People v. Lundy*, 334 Ill. App. 3d 819, 830, 779 N.E.2d 404, 414 (2002). To establish prejudice, a defendant must show a reasonable probability that (1) the motion would have been granted and (2) the outcome of the trial would have been different had the evidence been suppressed. A reasonable probability is one sufficient to undermine confidence in the outcome. Failure to file a motion to suppress does not establish incompetent representation when the motion would be futile. *Lundy*, 334 Ill. App. 3d at 830, 779 N.E.2d at 414.

¶ 20 In this case, trial counsel's filing of a motion to suppress would have been futile. Moreover, the evidence of defendant's guilt was overwhelming. Defendant was wearing pants covered with his blood and the blood of the victim. His fingerprints were found on some of the victim's personal effects. We thus conclude that counsel's performance in that regard was not deficient.

¶ 21 For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 assessment against defendant as costs of this appeal.

¶ 22 Affirmed.