

No. 1-10-0227

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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. 05 CR 23532
)	
VINCENT GLOVER,)	Honorable
)	Luciano Panici,
Defendant-Appellant.)	Judge Presiding.

JUSTICE STERBA delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held:* Defense counsel did not render ineffective assistance by not providing the trial court at sentencing with certain evidence regarding defendant's mental health, where the trial court had considerable relevant information on defendant's mental health and recited such information in pronouncing sentence. Defendant's three convictions for aggravated battery must be vacated under the "one act, one crime" rule as they are based on the same physical act as his attempted murder conviction.

¶ 2 Following a bench trial, defendant Vincent Glover was convicted of attempted first degree murder and three counts of aggravated battery and sentenced to concurrent prison terms of 28 years. On appeal, defendant contends that counsel rendered ineffective assistance by not

providing the court during sentencing with readily-available mitigating evidence regarding his mental health. He also contends that his aggravated battery convictions must be vacated because they arose from the same physical act as the attempted murder conviction.

¶ 3 Defendant was charged with one count of attempted first degree murder and three counts of aggravated battery, with all charges alleging that he "cut Cynthia Guerrero about the body with a knife" on or about September 25, 2005. In a separate case not part of this appeal, defendant was charged with aggravated kidnaping and aggravated unlawful restraint on allegations that he confined or detained Marlen Gonzalez while armed with a knife on or about August 30, 2005.

¶ 4 In September 2005, the court ordered a behavioral clinical examination (BCX) of defendant to determine his fitness to stand trial. The BCX report of November 28, 2005, by psychologist Dr. Erick Neu of the court's Forensic Clinical Services (FCS) found defendant fit to stand trial. Dr. Neu stated that defendant "appears to suffer from Schizophrenia or Schizotypal Personality Disorder" that was being treated in jail and which rendered him "prone to becoming confused" so that counsel would have to "routinely check in with the defendant and summarize what is occurring during and after court hearings." However, Dr. Neu found his symptoms were "not acute," he both understood the proceedings against him and expressed willingness to cooperate with counsel, and he did not appear to have any significant cognitive impairment.

¶ 5 However, another BCX report was issued on December 1, 2005, by psychiatrist Dr. Carol Flippen of FCS finding defendant unfit to stand trial. He showed symptoms of "a psychotic disorder, most likely Schizophrenia, Paranoid Type," which caused him to have "difficulty processing and manipulating information, [and in] sustaining attention and concentration." While he understood the proceedings against him, the aforementioned symptoms would impair his ability to "meaningfully assist his counsel." Dr. Flippen concluded that defendant could be restored by treatment to fitness within a year, with inpatient treatment being most appropriate.

¶ 6 On the basis of the latter report, the court on December 16, 2005, found defendant unfit for trial and remanded him to the custody of the Department of Human Services for treatment.

¶ 7 In March 2006, the Department reported to the court that defendant could be treated to render him fit for trial within a year from the finding of unfitness. He was diagnosed as having a "Psychotic Disorder, Not Otherwise Specified" that caused "thought blocking and paranoia" and would be treated with counseling and the anti-psychotic Risperdal. The Department reported again to the court in April 2006, opining that defendant was now fit to stand trial with medication. He was found to have "Schizophrenia, Undifferentiated Type" and "Borderline Intellectual Functioning." With the aforementioned medication and counseling, he had a "reduction of his symptoms of evasiveness, guardedness, and paranoia" with "adequate" impulse control, increased ability to concentrate, and improved judgment. Both Department reports were jointly issued by a psychiatrist and a social worker.

¶ 8 In April 2006, Dr. Flippen conducted a BCX of defendant and found him fit to stand trial with medications. While he "has the ability to assist his counsel toward his defense," he "could benefit from his attorney repeating important information" and an opportunity to question counsel regarding anything he does not readily understand. On April 12, 2006, the court found defendant fit to stand trial with medication based on Dr. Flippen's opinion and defendant's response to the court's inquiry that he was taking his prescribed medication.

¶ 9 On July 11, 2006, defense counsel asked the court for a BCX to determine defendant's sanity at the time of the alleged offenses, and the court so ordered. The record indicates that over the next several years, FCS was unable to make a sanity determination because it was unable to obtain medical records either from the jail's medical clinic at the time of defendant's initial admission to jail, or from the clinics defendant allegedly received medication from prior to the offense. The BCX order was reissued in September 2006 and again in September 2007. In

December 2007, FCS reported to the court that it "determined that other records were needed to potentially offer an opinion regarding sanity." In February 2008, psychiatrist Dr. Roni Seltzberg of FCS reported to the court that she conducted a BCX of defendant in October 2007 and February 2008 and found him fit to stand trial with medication, with no opinion as to his sanity at the time of the charged offenses. Regarding fitness, she noted that he was prescribed the antidepressant Prozac and the antipsychotic Risperdal with no "significant adverse effect *** on his cognitive functioning, behavior, or fitness to stand trial" and demonstrated both an understanding of the proceedings and the ability to assist in his defense. Regarding sanity, Dr. Seltzberg noted that defendant consistently denied the charges and stated that she had "insufficient records" to determine if he had any acute mental illness that could have caused him to lack substantial capacity to appreciate the criminality of his conduct at that time. On February 28, 2008, and various subsequent court dates into 2009, the court continued the case awaiting FCS's further report on sanity.

¶ 10 At the request of defense counsel, the court on February 24, 2009, ordered the jail's medical clinic, on pain of contempt, to provide counsel with defendant's psychiatric evaluation upon his initial admission to jail. However, the clinic reported to counsel the next day that the ordered information could not be located.

¶ 11 In April 2009, the court ordered FCS to evaluate defendant's sanity at the time of the alleged offenses using "available records." In May 2009, psychologist Dr. Christofer Cooper of FCS reported to the court that he examined defendant and reviewed the records, concluding that he was fit to stand trial and sane at the time of his alleged offenses. Dr. Cooper noted that defendant was "currently prescribed psychotropic medication" but had "no clinical indication of a mental condition that would preclude his fitness at the present time." Dr. Cooper found regarding sanity that defendant was not at the time of the alleged offenses "suffering from a

mental disease or defect which would have caused him to lack substantial capacity to appreciate the criminality of his conduct." Also in May 2009, psychiatrist Dr. Peter Lourgos of FCS reported to the court that, after examining defendant and reviewing his records, he found defendant fit to stand trial and sane. Dr. Lourgos' opinion echoed Dr. Cooper's, adding that defendant was prescribed Risperdal and Prozac with no relevant side effects.

¶ 12 Defendant stood trial for the Guerrero incident in November 2009. The evidence at trial showed that defendant came up from behind Guerrero as she walked along a street on an early Sunday afternoon. He grabbed and then struggled with her before she fell to the ground, a passer-by intervened, and he fled. During the struggle, defendant cut her hand, finger, chest, and throat with a knife. The passer-by did not see a knife but had seen defendant's hand on Guerrero's neck as they struggled and later saw that she was bleeding profusely from her neck. The passer-by characterized the struggle as defendant trying to drag Guerrero off the street. The passer-by took her to a nearby hospital, where she received several stitches on a finger and on her chest and neck. While Guerrero could not identify her attacker except by his shirt, the passer-by identified defendant before and during trial. When defendant was arrested a short time and distance from the incident, he dropped a bag containing a knife, homemade mask, electrical tape, and a bag of rocks. When an officer suspected from defendant's movements in the back seat of a police car that he was trying to move his cuffed hands in front of him, he was frisked and a handcuff key was found on his person though he had no handcuffs with him. The court found him guilty as charged and ordered a presentencing investigation report (PSI).

¶ 13 The PSI stated that defendant had been hospitalized for one day of mental health treatment when he was 18 years old and had been treated for schizophrenia since 1998. It also noted his treatment with Prozac and Risperdal while in jail, his multiple BCXs by FCS, the five months he was in Department custody, and the subsequent findings of fitness where his diagnosis

"remains" schizophrenia or schizotypal personality disorder. Defendant received his GED in 1991 and told the PSI preparer that he had not completed high school because he "just didn't do his homework" rather than because he could not read or write adequately.

¶ 14 At the sentencing hearing, the court heard testimony regarding the separately-charged Gonzalez incident. Less than a month before the instant offense and in the same suburb, defendant attacked Gonzalez from behind as she walked down the street. He grabbed her by the waist, put a knife to her throat, and dragged her off the street before the appearance of a passer-by caused him to flee. During the struggle, Gonzalez's throat was cut. Gonzalez later identified defendant in a lineup. The court also heard a victim-impact statement from Guerrero. In mitigation, counsel argued that defendant had no history of violence and that his only prior criminal charges were thefts disposed of by supervision. Counsel also noted "defendant's lengthy mental health history," specifically a history and present diagnosis of schizophrenia. Defendant addressed the court, denying that he committed the instant offenses, and asserted that he did not testify at trial because he "knew that I probably could beat the case without saying something" based on an identification issue. Before pronouncing sentence, the court recited the mental health portion of the PSI, noting that defendant "was then for a period of time declared to be unfit to stand trial when he was diagnose[d] as being schizophrenic and then sent to a mental health hospital and treated and restored to fitness," and that he had "limited education" including a GED. The court also found, based on the two incidents and particularly the "kit for murder" defendant had during the instant offense, that he "must be kept away from people because he is a psychopath" who "might commit these same crimes again." The court therefore sentenced defendant to 28 years' imprisonment.

¶ 15 In his post-sentencing motion, defendant raised no issues regarding his mental health history beyond a general claim that his sentence was excessive "in view of [his] background."

The court denied the motion, noting that defendant showed no remorse for his crimes and, in fact, still denied them. This appeal timely followed.

¶ 16 Before proceeding to the merits of this appeal, we must address the issues posed by the fact that the record on appeal includes a supplemental record consisting of defendant's records from the jail medical clinic and the Department as well as detailed reports from FCS that were the basis of the BCX reports in the unsupplemented record. The State requests that we disregard this supplemental record on the grounds that the documents therein were not presented in the trial court, were not duly authenticated nor was a foundation laid for their admission, and that defendant "has not indicated the circumstances under which the records were obtained."

¶ 17 The State is correct that the mental-health records and reports in the supplemental record were not presented in any trial court proceedings. We also take seriously the State's argument that "it is entirely possible that trial counsel did review at least some of [the documents at issue] and then decided that they contained unfavorable information, or information that was not sufficiently helpful to [defendant's] case." It is axiomatic that "ineffective assistance of counsel claims are preferably brought on collateral review rather than on direct appeal," particularly where the record on direct appeal is insufficient to support such a claim. *People v. Bew*, 228 Ill. 2d 122, 134 (2008), citing *Massaro v. United States*, 538 U.S. 500 (2003). Our supreme court more recently reiterated that an ineffective assistance claim is inappropriate for direct appeal where the "record is insufficient because it has not been precisely developed for the object of litigating a specific claim of ineffectiveness raised in the circuit court, thereby not allowing both sides to have an opportunity to present evidence thereon." *People v. Ligon*, 239 Ill. 2d 94, 105 (2010).

¶ 18 On the other hand, the fact that the documents in question were not presented to the trial court is the crux of defendant's ineffective-assistance claim. The documents were certified by the

clerk of the circuit court as part of the record on appeal and there is no reason to suspect that the documents are not what they purport to be. Against an assertion that "[w]here information not of record is critical to a defendant's claim, it must be raised in a collateral proceeding," (*People v. Richardson*, 401 Ill. App. 3d 45, 48 (2010)), we note that the documents in question are part of the record on appeal. Ultimately, we need not determine whether the supplemental record should be disregarded because, accepting it *arguendo* for purposes of the ineffective-assistance claim, we conclude for the reasons below that defendant has failed to show ineffective assistance of trial counsel.

¶ 19 On appeal, defendant first contends that trial counsel rendered ineffective assistance by not providing the court during sentencing with his readily-available psychiatric records, which would have shown that he suffered schizophrenia amenable to antipsychotic medication and that he had borderline intellectual functioning. Defendant contends that the absence of this evidence affected his sentence where the court found him to be an unrepentant "psychopath" and imposed nearly the maximum sentence.

¶ 20 A claim that trial counsel failed to render effective assistance is judged by the *Strickland* standard, whereby the defendant must show both that (1) counsel's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v. Manning*, 241 Ill. 2d 319, 326 (2011), citing *Strickland v. Washington*, 466 U.S. 668 (1984).

¶ 21 A person is insane, that is, "not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or mental defect, he lacks substantial capacity to appreciate the criminality of his conduct." 720 ILCS 5/6-2(a) (West 2010). It is a mitigating factor in sentencing that there "were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense." 730 ILCS 5/5-5-3.1(a)(4) (West 2010).

However, in light of the inherent balancing nature of sentencing and the trial court's considerable discretion in sentencing, evidence of mental health issues does not necessitate a minimum sentence. *People v. Calabrese*, 398 Ill. App. 3d 98, 126-27 (2010) (affirming 70-year prison sentence for first degree murder with an applicable sentencing range of 45 to 85 years).

¶ 22 Here, the court was sufficiently aware of defendant's mental health history, and in particular his diagnosis of schizophrenia. The PSI recited this history, as did the court before passing sentence, and counsel argued defendant's mental health history as a mitigating factor. Defendant argues that the court was not informed that defendant's mental illness responded well to medication, but such a conclusion would be readily apparent from the record available to the trial court. Defendant was found unfit for trial and committed to Department custody, then after a few months of treatment he was found fit with medication thereafter. The court at sentencing expressly noted that defendant was found unfit for trial and then restored to fitness. While there was reference to defendant's borderline intellectual functioning in the Department's report (in the unsupplemented record available to the trial court), he received his GED, and moreover the court acknowledged defendant's "limited" education in pronouncing sentence. Defendant argues that defense counsel was ineffective for failing to provide the court with specific examples from defendant's medical records. Defendant further argues that the judge who sentenced him was not familiar with the information contained in his records because the case was assigned to different judges at different times. However, the court had access to the common law record which contained the various aforementioned BCX reports and presumably considered its contents, and defense counsel's statements were sufficient to invite the court's attention to defendant's mental health issues.

¶ 23 On the key question of whether defendant was under treatment and receiving medication at the time of his offenses, defendant concedes that the "readily available" records did not include

the "best source for information about [his] psychiatric treatment immediately before his arrest," the records of the jail medical clinic from his initial admission to jail, because counsel tried to obtain these records but was unsuccessful. The remaining evidence on the point is ambiguous: while a Department review of records showed that defendant was not receiving psychiatric treatment at the time of his arrest, and defendant stated in one of his many examinations that he was not receiving treatment, he reported at other examinations that he was receiving anti-depression medication, which would tend to indicate that he was under medical care to some degree and at some proximate point.

¶ 24 Lastly, we note that defendant takes tentative swipes at an insanity argument by contending that "counsel essentially conceded [his] guilt by deciding not to pursue an insanity defense" and that a "guilty finding was inevitable because the State's evidence, unchallenged by a contrary defense theory that [he] was insane, was overwhelming." However, after counsel sought a BCX on sanity, which commenced a multi-year effort to retrieve sufficient records for FCS to opine on insanity, an FCS psychologist and psychiatrist concurred that defendant was sane at the time of the offense. Moreover, there was evidence that defendant had at the time of his offenses the capacity to appreciate the criminality of his conduct, where he fled during both incidents when a passer-by appeared, he dropped his bag containing suspicious materials when confronted by police, and he kept a handcuff key on his person apparently to effect escape if detained by police.

¶ 25 For the aforementioned reasons, we conclude that defendant has failed to show that trial counsel was ineffective for not arguing mitigation based on a more detailed explication of his mental health history.

¶ 26 Defendant also contends that this court should vacate his three aggravated battery convictions. The "one act, one crime" rule prohibits convictions for multiple offenses based

1-10-0227

upon the same physical act. *People v. Tolentino*, 409 Ill. App. 3d 598, 610 (2011). Here, the aggravated battery convictions were based on the same physical act as the attempted murder, namely, cutting Guerrero with a knife. While the State contends that this error was not preserved for appeal, a "one act, one crime" violation affects the integrity of the judicial process and is thus reviewable as plain error. *Tolentino*, 409 Ill. App. 3d at 609-10.

¶ 27 Accordingly, pursuant to Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999), defendant's convictions for aggravated battery are vacated. The judgment of the circuit court is affirmed in all other respects.

¶ 28 Affirmed in part and vacated in part.