

Third Division
May 23, 2012

No. 1-11-0057

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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.)	10 CR 5832
)	
MELVIN BROUGHTON,)	Honorable
)	Marcus R. Salone,
Defendant-Appellant.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Steele and Justice Murphy concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant's trial counsel provided ineffective assistance when he failed to argue that defendant acted in self-defense by hitting a police officer in response to a police officer's use of the excessive force of a taser to effect an arrest.
- ¶ 2 The trial court, in a bench trial, found Melvin Broughton guilty of aggravated batteries of two police officers because Broughton struck the officers when they arrested him. In this appeal, Broughton argues that his trial counsel provided ineffective assistance by failing to argue that the

officers used excessive force to make the arrest, and the excessive force justified Broughton's acts as self-defense. We agree with Broughton that trial counsel provided ineffective assistance, so we reverse one of the aggravated battery convictions and remand for a new trial on that charge.

¶ 3 BACKGROUND

¶ 4 On March 13, 2010, a person on North Michigan Avenue reported a pickpocketing to Officer Luis Novalez of the Chicago Police Department. Novalez drove south on Michigan Avenue, and stopped to question Broughton on the street near Wacker. DuPage County had issued a warrant for Broughton's arrest in January 2010. Broughton, who was 44 years old and weighed almost 200 pounds, ran when he saw Novalez approaching. Novalez called for assistance and Officer Albert Powe responded.

¶ 5 Novalez saw Broughton run to the el station at Randolph and Wabash. Powe followed Novalez up the stairs into the station where he saw Broughton jump onto the tracks, still running. Broughton tried to hide on a small platform under the tracks and above the street. Powe stood over the cubbyhole and told Broughton to climb out. Broughton said he needed to catch his breath. Powe lowered himself into the cubbyhole where Broughton sat. When Powe pointed his gun at Broughton, Broughton raised his hands. Powe grabbed Broughton and Broughton swatted at Powe's arms, remaining seated. Powe picked up Broughton by his collar then lifted him towards the other officers, including Novalez, who stood on the tracks over Broughton. Another officer shocked Broughton with a taser. Broughton swung a fist that hit Novalez's leg.

¶ 6 The officers found no evidence that Broughton had any connection to the picked pocket.

¶ 7 Prosecutors charged Broughton with resisting arrests by both Powe and Novalez, and with

aggravated batteries of each officer by both causing bodily harm and by insulting or provoking contact, for a total of six counts.

¶ 8 At the trial, Powe and Novalez recounted the incident and admitted that Broughton's swinging at them caused them no cuts, bruises or any similar harm, and they sought no medical treatment after the incident. Broughton did not testify.

¶ 9 The court found Broughton not guilty of causing bodily harm to the officers but guilty of resisting arrest and aggravated battery by making insulting or provoking contact with the officers. The court then questioned Broughton about the incident. Broughton said he ran because of the warrant from DuPage County, and after the officers caught him, he just asked for a moment to recover from running.

¶ 10 At a hearing on Broughton's posttrial motion, the trial court reversed the initial finding on the charges of resisting arrest. The court sentenced Broughton to concurrent 5 year terms on the charges of aggravated battery by insulting or provoking contact with the two officers. Broughton now appeals.

¶ 11 ANALYSIS

¶ 12 On appeal, Broughton argues that he did not receive effective assistance of counsel at trial because his counsel failed to raise the officers' use of excessive force as a defense to the charge that he committed an aggravated battery against Novalez. Broughton does not challenge his conviction or sentence on the charge that he committed an aggravated battery against Powe.

¶ 13 To prevail on a claim of ineffective assistance of counsel, "[a] defendant must show that (1) trial counsel's representation fell below an objective standard of reasonableness, and (2) [h]e was

prejudiced by the deficient performance." *People v. Haynes*, 408 Ill. App. 3d 684, 689 (2011). When police officers use excessive force to arrest a defendant, the defendant may have sufficient justification for striking at police in self-defense. *People v. Lyda*, 190 Ill. App. 3d 540, 545-46 (1989). The failure to raise a viable claim that the defendant acted in self-defense may warrant a finding of ineffective assistance of counsel, if no trial strategy justifies the omission. *People v. Wright*, 111 Ill. 2d 18, 26-27 (1986); *Haynes*, 408 Ill. App. 3d at 689; *People v. Gill*, 355 Ill. App. 3d 805, 811-12 (2005).

¶ 14 Here, Powe held Broughton and lifted him part of the way to the tracks, and other officers also grabbed Broughton to pull him out of the cubbyhole, when one officer shocked Broughton with a taser and Broughton flailed with a fist that struck Novalez's leg. Because the trier of fact found Broughton not guilty of resisting arrest, the trier of fact also could have found that the evidence supported a finding that police used excessive force when they tased Broughton when they already had him under their control. See *Lewis v. Downey*, 581 F.3d 467, 477-78 (7th Cir. 2009). If police used excessive force, Broughton's flailing with a fist may count as self-defense. See *People v. Sims*, 374 Ill. App. 3d 427, 432 (2007).

¶ 15 We can see no strategic purpose for counsel's failure to raise the issue of the officers' use of excessive force. Emphasizing evidence of excessive force would not have adversely affected Broughton's successful defense to the charges of resisting arrest. Compare *People v. Cunningham*, 376 Ill. App. 3d 298, 302-03 (2007). Where the State's evidence itself can support a claim that police used excessive force, and where no strategic purpose excused counsel from raising the issue, we find that trial counsel's representation of Broughton fell below an objective standard of

reasonableness when counsel failed to argue that Broughton only acted in self-defense after officers shocked him with a taser. See *Lyda*, 190 Ill. App. 3d at 545-46.

¶ 16 To show that counsel's error caused prejudice, Broughton must show a reasonable probability that he would have achieved a better result had counsel not erred. *People v. Evans*, 209 Ill. 2d 194, 220 (2004). A defendant has a right to protect himself against the use of excessive force to make an arrest. See *Lyda*, 190 Ill. App. 3d at 545-46; *Sims*, 374 Ill. App. 3d at 432. To establish a claim of self-defense, the evidence must support inferences that someone threatened to use unlawful force against the defendant and created an imminent danger of harm, the defendant did not initiate the aggression, the defendant actually and reasonably believed he faced danger, and the defendant did not respond excessively. See *People v. Dunlap*, 315 Ill. App. 3d 1017, 1025 (2000)

¶ 17 By shocking Broughton, the officer acted unlawfully unless Broughton's acts made shocking him necessary. See *Sims*, 374 Ill. App. 3d at 433-35. The shock actually harmed Broughton. We also note that Broughton had no connection to the picked pocket the police were investigating. Broughton ran from police, and he asked them to wait for him to catch his breath, but no evidence suggests that he confronted police aggressively. In fact, Broughton was found not guilty of resisting arrest. The evidence could support findings that Broughton reasonably believed he faced danger from the police, who harmed him with the taser, and by flailing with his fist, he did not respond excessively. Therefore, applying the elements of self-defense as articulated in *Dunlap*, we find that Broughton has established a reasonable probability that he could have persuaded the trial court, which found Broughton not guilty of resisting arrest, that self-defense justified his contact with Novalez, and that the court should not find him guilty of committing an aggravated battery against

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Novalez.

¶ 18 Thus, we find that Broughton received ineffective assistance of counsel in the defense his attorney provided against the charge that he committed an aggravated battery against Novalez by making contact of an insulting or provoking nature. We vacate the conviction on that charge and remand the case for retrial on the charge of aggravated battery against Novalez.

¶ 19 **CONCLUSION**

¶ 20 The evidence at trial could support a finding that police officers used excessive force against Broughton when they shocked him with a taser in the course of arresting him, especially because Broughton did not resist arrest. The officers' use of excessive force might excuse Broughton's act of striking Officer Novalez. Trial counsel provided objectively unreasonable assistance by failing to raise at trial the issue of excessive force, and Broughton has established a reasonable probability that he would have achieved a better result if his trial counsel had not erred. Due to ineffective assistance of counsel, we reverse the conviction on one count of aggravated battery and remand for a new trial on that charge.

¶ 21 Affirmed in part, reversed in part and remanded.