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2013 IL App (3d) 110873-U

Order filed December 12, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 10th Judicial Circuit,
Plaintiff-Appellee,)	Tazewell County, Illinois,
)	
v.)	Appeal No. 3-11-0873
)	Circuit No. 06-CF-285
)	
KAREN F. McCARRON,)	Honorable
)	Stephen A. Kouri and Stuart P. Borden,
Defendant-Appellant.)	Judges, Presiding.

PRESIDING JUSTICE WRIGHT delivered the judgment of the court.
Justice Carter concurred in the judgment.
Justice Lytton dissented.

ORDER

¶ 1 *Held:* The trial court did not err when it dismissed defendant's postconviction petition at the second stage.

¶ 2 Defendant, Karen F. McCarron, was convicted of first degree murder (720 ILCS 5/9-1(a)(1) (West 2006)), obstruction of justice (720 ILCS 5/31-4(a) (West 2006)), and concealment of a homicidal death (720 ILCS 5/9-3.1(a) (West 2006)). Her convictions were affirmed on appeal. *People v. Frank-McCarron*, 403 Ill. App. 3d 383 (2010). Thereafter, defendant filed a

postconviction petition. The circuit court dismissed the petition at the second stage. Defendant appeals, arguing that the dismissal was error. We affirm.

¶ 3

FACTS

¶ 4 Defendant was charged with two counts each of first degree murder (720 ILCS 5/9-1(a)(1) (West 2006)), obstruction of justice (720 ILCS 5/31-4(a) (West 2006)), and concealment of a homicidal death (720 ILCS 5/9-3.1(a) (West 2006)). The indictment alleged that defendant killed her three-year-old daughter by holding a plastic bag over her head, and then attempted to conceal the circumstances surrounding her daughter's death.

¶ 5 Evidence presented at trial established the following facts. On May 13, 2006, defendant, defendant's mother, defendant's daughters, K.M. and E.M., were together at defendant's home. Shortly after lunch, defendant put E.M. down for a nap and took K.M., who suffered from autism, for a ride in the car to relax K.M. Defendant stopped at her parents' house and brought K.M. into the home. While alone with her daughter inside the house, defendant suffocated K.M. by placing a white plastic bag over her head. Defendant carried her daughter's body back to the car and returned to her own home.

¶ 6 After arriving home, defendant brought K.M. into the house, told her mother that K.M. was sleeping, carried K.M. upstairs and placed her in bed. Defendant engaged in normal activities and at one point told the family members present that she was going to the grocery store for ice cream. However, defendant drove back to her parents' house and retrieved the plastic bag she used to suffocate her daughter. Before returning home, defendant took the bag to a local gas station where she threw it into an outdoor garbage can.

¶ 7 A few hours later, defendant told her mother and brother that she was going to go upstairs

to check on K.M. Once upstairs, defendant started screaming and told her mother and brother that K.M. was not breathing. Defendant's brother called 911. After the police and paramedics arrived, defendant told them that she put K.M. down for a nap and when she returned to wake her, she was not breathing. K.M. was transported to the hospital where she was pronounced dead.

¶ 8 Defendant's husband, Paul, was in North Carolina at the time of K.M.'s death. When he returned, he discovered defendant in their master bedroom with a suicide note. Defendant told Paul that she killed K.M. Defendant also told her mother that she killed K.M. When police and paramedics arrived to tend to defendant, Paul told the police that defendant said she killed K.M.

¶ 9 While at the hospital, Officer Brent McLean interviewed defendant and she reported to the officer that she admitted to her husband that she killed K.M. Defendant also phoned a friend and informed her that she killed K.M. and planned to confess the next day. Thereafter, she called Paul's father and also informed him that she suffocated K.M. with a plastic bag. Defendant also told a psychiatrist that she felt guilty because K.M.'s autism was not improving and because she killed her.

¶ 10 On May 15, 2006, two detectives arrived at the hospital to talk with defendant. Paul was there and stayed with defendant during the interview. Again, defendant confessed she killed K.M. Toward the end of the interview, the police suggested a second video-recorded interview would be in order and defendant agreed. One hour later, the officers conducted a second interview with Paul sitting next to defendant during the conversation. The video recording of this interview shows defendant touching her wedding ring while talking to the police. Defendant told the officers that she decided to kill K.M. because she wanted "autism out of [her] life."

¶ 11 During the trial, both sides presented expert witnesses with regard to defendant's insanity defense. Defendant's witness opined that she suffered from major depressive disorder and delusions and that she was obsessed with K.M.'s autism. The State's expert agreed defendant suffered from major depression but did not agree she was delusional.

¶ 12 At the conclusion of the trial, the jury found defendant guilty on all counts. The trial court sentenced defendant to 36 years in prison. While incarcerated, defendant filed a postconviction petition which was later amended. The amended postconviction petition alleged that trial counsel was ineffective for permitting the State to present Paul's perjured testimony at the suppression hearing and failing to seek suppression of defendant's video-recorded statements. She further alleged counsel was ineffective for basing his defense strategy around defendant's confession and for excessive use of alcohol during the course of the trial.

¶ 13 Attached to the petition were affidavits from defendant, defendant's parents, defendant's brother, Fr. Michael Driscoll, and David Byrne. The affidavits from Fr. Driscoll, defendant's parents, and her brother discussed defendant's mental state and noted that defense counsel did not discuss defendant's mental condition with those parties before trial.

¶ 14 Byrne's affidavit stated he attended four days of defendant's trial and observed defense counsel's speech was slurred, his cheeks were rosy, and his eyes were glassy. Based on Byrne's experience with his own alcoholic father, he concluded defendant's attorney was impaired by alcohol during the trial. Also attached to the petition was a list of receipts documenting the defendant's two attorneys purchased over \$500 in alcoholic beverages over the course of defendant's 12-day trial.

¶ 15 The circuit court entered a written order granting the State's motion to dismiss

defendant's second stage postconviction petition. Defendant appeals.

¶ 16

ANALYSIS

¶ 17 Defendant argues that the circuit court erred when it dismissed her postconviction petition at the second stage. A postconviction petition is a collateral attack on a prior conviction and sentence. *People v. Rissley*, 206 Ill. 2d 403 (2003). The Post-Conviction Hearing Act (Act) provides a three-step procedure for the adjudication of petitions for postconviction relief. 725 ILCS 5/122-1 *et seq.* (West 2010). At the second stage, the defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Coleman*, 206 Ill. 2d 261 (2002). During this stage, all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true. *People v. Childress*, 191 Ill. 2d 168 (2000). The circuit court is prohibited from engaging in any fact-finding. *People v. Coleman*, 183 Ill. 2d 366 (1998). However, the circuit court may review the record of the trial proceedings to determine whether the defendant's contentions are contradicted by the record or are otherwise nonmeritorious. *People v. Rogers*, 197 Ill. 2d 216 (2001). A petition will move to the third stage only if the defendant has made a substantial showing of a constitutional violation. *Coleman*, 206 Ill. 2d 261. We review a circuit court's decision to dismiss a postconviction petition at the second stage *de novo*. *Id.*

¶ 18 Paul testified before the court during the suppression hearing and stated he returned defendant's wedding band after the second recorded interview with police. We agree the video tape of the second interview shows defendant was in possession of her wedding band during the interview, which contradicts Paul's testimony. However, to establish Paul presented perjured testimony, defendant must show by clear and convincing evidence that Paul's statement was not

merely false, but also was wilfully and purposely given and material to the issue such that the false statement probably controlled the determination. See *People v. Jennings*, 48 Ill. 2d 295 (1971). In this case, defendant claims her confession was coerced because Paul falsely implied he would continue their marriage if she took responsibility for their daughter's death. Defendant contends that even though Paul returned her wedding band, he did not intend to keep this implied promise. At issue is whether Paul coerced a false confession by defendant who hoped her admissions would protect their marriage. Instead, days after defendant's admission, Paul filed for divorce.

¶ 19 Whether Paul returned the wedding band before, during, or after the second interview is immaterial. The material fact at issue is whether Paul deceived defendant into believing her willingness to cooperate with the police, without the benefit of the advice of legal counsel, would insure Paul would continue their marriage. Thus, the truth or falsity with respect to the timing of the ring's return is not material and hence the testimony, whether entirely false or wholly mistaken, does not rise to the level of perjury. See *Jennings*, 48 Ill. 2d 295.

¶ 20 Next, defendant claims her attorney was ineffective because he elected to try to convince the jury that defendant's confessions were unreliable and coerced, rather than attempting to have the recorded interviews entirely suppressed and excluded from the jury's consideration. She suggests a better defense strategy would have been to present witnesses able to describe defendant's declining mental state and growing religious delusions.

¶ 21 In this case, defendant made multiple admissions to many individuals in addition to the confessions she provided to the police. Even if defense counsel successfully obtained a ruling suppressing the police interviews, defendant made many similar statements to friends and

relatives when the police were not present. Hence, we reject the notion that if counsel's strategic choice constituted ineffective assistance. See *People v. Patterson*, 217 Ill. 2d 407 (2005) (generally, matters of trial strategy will not support a claim of ineffective assistance of counsel unless counsel failed to conduct any meaningful adversarial testing).

¶ 22 Next, we consider defendant's serious allegation that defense counsel drank excessively during the time span of defendant's trial and was ineffective due to the obvious effects of alcohol. In this case, the trial court swiftly corrected counsel's tardiness. Had the trial judge noticed any indication counsel was not sober, at any point in the proceedings, we are confident the same trial judge would have firmly addressed this matter on the record. Importantly, the record in this case does not contain any evidence that defendant's family members, clerks, reporters, bailiffs, or any other courthouse personnel noticed the same symptoms reported by Byrne.

¶ 23 We note the physical conditions Byrne observed are not unique to alcohol consumption. Slurred speech and glassy eyes may be attributable to fatigue. Rosy cheeks can indicate a multitude of stress related medical conditions or result from being too warm or cold while in the courtroom. It is significant that Byrne did not report he smelled an odor of alcohol or witnessed counsel consuming alcoholic beverages during the court's business hours. Therefore, even taking Byrne's observations as true, we conclude that the record contradicts his conclusion that counsel was, in fact, intoxicated. See *Rogers*, 197 Ill. 2d 216.

¶ 24 Finally, the receipts tendered to the court documented both meals and drinks purchased by both attorneys, after hours. Based on these exhibits, standing alone, we would have to engage in endless speculation to determine whether either attorney consumed the alcoholic beverages purchased or whether defense counsel bought drinks for others who may have been socializing

with the attorneys after hours. See *Coleman*, 183 Ill. 2d 366 (nonfactual and nonspecific conclusory assertions are not sufficient to require a third stage hearing under the Act).

¶ 25 Therefore, we conclude the allegations in defendant's postconviction petition did not amount to a substantial showing of a constitutional violation based on ineffective assistance of counsel or warrant a third stage evidentiary hearing. Accordingly, the circuit court's dismissal of defendant's postconviction petition at the second stage is affirmed.

¶ 26 CONCLUSION

¶ 27 The judgment of the circuit court of Tazewell County is affirmed.

¶ 28 Affirmed.

¶ 29 JUSTICE LYTTON, dissents.

¶ 30 A State's motion to dismiss at the second stage of a postconviction proceeding assumes the truth of all well-pleaded facts. *People v. Ward*, 187 Ill. 2d 249, 255 (1999). Thus, the trial court is precluded from engaging in any fact finding at a second stage hearing. *People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998). It is not until the evidentiary hearing that the court serves as a fact finder and determines witness credibility and the weight to be given to testimony and evidence, and resolves any evidentiary conflicts. *People v. Domagala*, 2013 IL 113688, ¶ 34. As articulated in *Coleman*,

"At the dismissal stage of a post-conviction proceeding, all well-pleaded facts that are not positively rebutted by the original trial record are to be taken as true. The inquiry into whether a post-conviction petition contains sufficient allegations of constitutional deprivations does not require the circuit court to engage in any fact-finding or credibility determinations. The Act contemplates that such

determinations will be made at the evidentiary stage, not the dismissal stage, of the litigation. Due to the elimination of all factual issues at the dismissal stage of the post-conviction proceeding, a motion to dismiss raises the sole issue of whether the petition being attacked is proper as a matter of law." *Coleman*, 183 Ill. 2d at 385.

¶ 31 Here, the trial court engaged in fact finding and assessed witness credibility at the second stage of defendant's postconviction proceeding. In dismissing defendant's petition, the trial court found that defendant's ex-husband was "merely mistaken" when he testified at the suppression hearing and that trial counsel was not impaired during defendant's trial. Such determinations should be made at the evidentiary stage of a postconviction proceeding, not the dismissal stage. Taking the well-pleaded facts in the petition and supporting affidavits as true, which the trial court is required to do at the second stage, I believe defendant made a substantial showing of a constitutional violation. Thus, I would reverse the dismissal of defendant's postconviction petition and remand for an evidentiary hearing at the third stage of the proceeding.