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2013 IL App (3d) 120116-U

Order filed December 4, 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 21 st Judicial Circuit
)	Kankakee County, Illinois,
Plaintiff-Appellee,)	
)	Appeal No. 3-12-0116
v.)	No. 08-CF-794
)	
AARON M. MINZGHOR,)	The Honorable
)	Kathy Bradshaw-Elliott,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Presiding Justice Wright and Justice O'Brien concurred in the judgment.

ORDER

- ¶ 1 *Held:* *Res judicata* bars consideration of issues that were raised and decided on direct appeal, and issues that could have been presented on direct appeal, but were not, are considered waived. Where the statement is not "testimonial" in nature, the confrontation clause is not implicated and the statement's admissibility is determined by applying evidentiary hearsay rules and various hearsay exceptions. Prior "testimonial" statements are admissible if the declarant testifies at trial.
- ¶ 2 Defendant, Aaron M. Minzghor, appeals from an order of the circuit court of Kankakee County summarily dismissing his petition for post conviction relief. For the reasons that follow,

we affirm. Because the facts of this case are set forth adequately in the order concerning defendant's direct appeal, we state here only those facts necessary to the disposition of his post conviction appeal.

¶ 3

FACTS

¶ 4 The victim, Lisa O., testified that defendant sexually assaulted her on Friday. The victim went to work the following Monday with her brother's girlfriend, Nicole Bessieres. Nicole noticed that Lisa seemed upset. Lisa asked Nicole if she could stay with her and her brother. Nicole asked Lisa why she was upset, and why she wanted to stay with them. Lisa told Nicole about the incident with defendant. Nicole reported the incident to Lisa's brother and father. Later, Nicole took Lisa to police. The circuit court permitted Nicole to relay what Lisa told her about the incident under the excited utterance exception to the hearsay rule. Over a defense objection, Nicole testified at the trial that, when Lisa told her about the incident, she said that defendant had hurt her and had "done stuff with her that only a husband would do with a wife." Lisa told Nicole that defendant had put his fingers inside of her. Nicole testified that Lisa started and stopped crying throughout their conversation.

¶ 5 The circuit court found defendant guilty. Defendant filed a motion for a new trial arguing, *inter alia*, that the trial court erred in admitting Lisa's statements to Nicole as excited utterances. The trial court denied defendant's motion and sentenced him to five years' imprisonment.

¶ 6 Defendant's sole argument on direct appeal (*People v. Minzghor*, No. 3-09-0641 (2011) (unpublished order pursuant to Supreme Court Rule 23) was that the circuit court committed reversible error when it admitted the Lisa's statements under the excited utterance exception. We

rejected this argument and affirmed defendant's conviction and sentence. *People v. Minzghor*, No. 3-09-0641 (2011) (unpublished order pursuant to Supreme Court Rule 23).

¶ 7 Defendant's post conviction petition reasserted that the admission of the Lisa's statements under the excited utterance exception was improper. It also alleged the following novel claims: (1) the circuit court improperly excluded the testimony of two witnesses (Sharyn Ferris and David Ferris), (2) trial counsel was ineffective in failing to return alleged phone calls made by the two witnesses, (3) trial counsel was ineffective for failing to inform the two witnesses that they may be called to testify and thus could not be in court when the trial was proceeding, (4) trial counsel was ineffective for failing to challenge the exclusion of the two witnesses in defendant's motion for a new trial, and (5) "[d]efendant was denied effective assistance of appellate counsel when on appeal, where the crucial issue was admission of hearsay, counsel on appeal did not cite to the court the relevant Supreme Court case of *Crawford v. Washington*, 541 U.S. 36 (2002)."

¶ 8 The circuit court summarily dismissed defendant's petition. Defendant appeals.

¶ 9 ANALYSIS

¶ 10 Defendant argues the circuit court erred in summarily dismissing his post conviction petition. Upon review, we find the doctrines of *res judicata* and waiver bar all of defendant's post conviction allegations, except his claim regarding the alleged ineffective assistance of appellate counsel. This remaining claim, however, lacks merit because Lisa's hearsay statements were not "testimonial" in nature and alternatively, she testified at trial.

¶ 11 The supreme court in *People v. Barrow*, 195 Ill. 2d 506 (2001) discussed the scope of post conviction proceedings and the impact the doctrines of *res judicata* and waiver have upon such proceedings. Specifically, the court held:

"The Post-Conviction Hearing Act [citation] provides a remedy by which defendants may challenge their convictions or sentences for violations of federal or state constitutional law. [Citations.] A post-conviction action is a collateral proceeding, and not an appeal from the underlying judgment. [Citations.] The purpose of the proceeding is to allow inquiry into constitutional issues relating to the conviction or sentence that were not, and could not have been, determined on direct appeal. [Citations.] Thus, *res judicata* bars consideration of issues that were raised and decided on direct appeal, and issues that could have been presented on direct appeal, but were not, are considered waived. [Citations.]

A defendant is not entitled to an evidentiary hearing on a post-conviction petition as a matter of right. [Citations.] Rather, an evidentiary hearing is warranted only when the allegations of the post-conviction petition, supported when necessary by the trial record or accompanying affidavits, make a substantial showing that the defendant's constitutional rights have been violated. [Citations.] In determining whether to grant an evidentiary hearing, all well-pleaded facts in the petition and in any accompanying affidavits must be taken as true. [Citation.] A circuit court's dismissal of a post-conviction petition without a hearing will be reviewed *de novo*. [Citation.]" *Barrow*, 195 Ill. 2d

at 518-19.

¶ 12 Defendant challenged the admission of the Lisa's statements under the excited utterance exception on direct appeal. Thus, this specific claim is now barred under the doctrine of *res judicata*. *Barrow*, 195 Ill. 2d at 519. While defendant could have also challenged the circuit court's alleged exclusion of Sharyn Ferris and David Ferris on direct appeal, he chose not to do so. Likewise, defendant did not put forth any claim alleging his trial counsel was ineffective. Thus, these claims are now waived. *Barrow*, 195 Ill. 2d at 519. The only post conviction allegation that survives the procedural bars of *res judicata* and waiver is defendant's claim that appellate counsel was ineffective for failing to cite *Crawford* when arguing Lisa's hearsay statements were improperly admitted. While the circuit court's order does not directly address this specific claim, we find that the claim lacks merit because Lisa's statements were not "testimonial" in nature and alternatively, she testified at trial.

¶ 13 Under *Crawford*, the sixth amendment's confrontation clause precludes the use of a "testimonial" statement made by a witness who does not testify at a criminal trial, unless the witness is unavailable to testify at trial and was previously subjected to cross-examination. *Crawford*, 541 U.S. at 67-68. However, where the statement is not "testimonial" in nature, the confrontation clause is not implicated and the statement's admissibility is determined by applying evidentiary hearsay rules and various hearsay exceptions. *Crawford*, 541 U.S. at 67-68.

¶ 14 While the *Crawford* Court refused to provide a comprehensive definition of what constituted "testimonial" evidence, it stated that such evidence would necessarily include "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Crawford*, 541 U.S. at 68. Lisa's statements do not fall within any of these

parameters. Consequently, the confrontation clause is not implicated and the admissibility of Lisa's statements is determined by applying evidentiary hearsay rules and various hearsay exceptions.¹

¶ 15 Even assuming, however, that Lisa's statements were "testimonial" in nature, such statements still do not implicate the confrontation clause due to the fact Lisa testified at trial.

The confrontation clause places no restrictions on the admission of prior testimonial statements if the declarant testifies at trial. *Crawford*, 541 U.S. at 53-54. In light of the above facts, defendant is unable to establish appellate counsel was ineffective in failing to cite *Crawford*.

¶ 16 Accordingly, we affirm the summary dismissal of defendant's post conviction petition.

¶ 17 Affirmed.

¹ Again, we have already affirmed the circuit court's evidentiary decision that Lisa's statements fall under the excited utterance exception.