

2014 IL App (1st) 120582-U
Nos. 1-12-0582 & 1-12-2007 (Cons.)
April 30, 2014

THIRD DIVISION

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	Of Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 05 CR 106
)	
EUGENE WILLIAMS,)	The Honorable
)	William J. Kunkle,
Defendant-Appellant.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Hyman and Justice Mason concurred in the judgment.

ORDER

¶ 1 *Held:* Postconviction petitioner adequately alleged ineffective assistance of trial counsel where trial counsel failed to argue that the court should not infer that he caused bodily harm and trial counsel failed to suggest a lesser offense, which would not subject petitioner to a mandatory sentence of life in prison. Postconviction petitioner also adequately alleged ineffective assistance of appellate counsel based on appellate counsel's failure to argue ineffective assistance of trial counsel.

¶ 2 Eugene Williams appeals from the dismissal of his postconviction petition at the first stage of postconviction proceedings. The trial court, after a bench trial, found Williams

guilty of armed violence and aggravated battery because he punched a man, in a fit of road rage, while carrying a knife. Two prior felony convictions made Williams a habitual criminal, so the trial court sentenced Williams to natural life in prison. In his postconviction petition, Williams claimed that appellate counsel should have argued that trial counsel provided ineffective assistance by failing to suggest a lesser charge. We find that Williams has stated the gist of a claim that his attorneys' ineffective assistance violated his constitutional rights. We reverse the dismissal of his petition and remand for further proceedings in accord with this order.

¶ 3

BACKGROUND

¶ 4

When Nicholas Perrino and Robert Fecarotta finished working at a job on North Magnolia Avenue in Chicago on December 10, 2004, Perrino got into his van in the alley. A coworker drove the van in the alley, across Magnolia, with Fecarotta following in his car. Williams, driving on Magnolia, stopped at the entrance to the alley. Williams, Perrino and Fecarotta all got out of their vehicles. Williams complained that the van almost hit Williams's car. Williams and Perrino shouted some obscenities at each other and made physical contact. Fecarotta called police. Williams drove away.

¶ 5

Fecarotta remembered the number on Williams's license plates and told police. When police arrested Williams a few minutes later, they found in his pocket a knife with a blade more than three inches in length. Prosecutors charged Williams with aggravated battery, armed violence, and unlawful use of a weapon by a felon. Because Williams's criminal record included 1989 and 1994 convictions for armed robbery, the prosecution also sought to have the court sentence Williams as a habitual criminal.

¶ 6 At the bench trial, Perrino testified that Williams punched Perrino in the head and pulled out a knife. Perrino pushed Williams away. Williams swung the knife, but hit nothing, before he drove away. Williams testified that he only pushed Perrino. Williams said he never punched Perrino and he never pulled out the knife.

¶ 7 Defense counsel waived closing argument. The trial court said that Williams's own testimony proved him guilty of aggravated battery and armed violence, because Williams admitted that he pushed Perrino on a public way while carrying a knife. The court sentenced Williams, as a habitual offender, to natural life in prison.

¶ 8 On the direct appeal, Williams's appellate counsel argued that the evidence failed to prove that Williams caused Perrino bodily harm. The appellate court held that Perrino's testimony that Williams punched Perrino in the head permitted the trier of fact to infer that Perrino suffered bodily harm, within the meaning of the battery statute. 720 ILCS 5/12-3(a)(1) (West 2004); *People v. Williams*, No. 1-08-0434 (2010) (unpublished order under Supreme Court Rule 23). The appellate court affirmed the conviction and sentence.

¶ 9 On October 5, 2011, Williams filed a postconviction petition, alleging that he received ineffective assistance of trial and appellate counsel. The trial court dismissed the petition as frivolous. Williams now appeals.

¶ 10 ANALYSIS

¶ 11 Williams focuses on two aspects of his trial counsel's conduct: counsel decided to waive closing argument, and counsel failed to seek a lesser charge, such as aggravated assault or reckless conduct, which would not have led to a sentence of natural life in prison. See 720

ILCS 5/12-2(a)(9)(b), 5/12-5(a) (West 2004). Williams asserts that his appellate counsel provided ineffective assistance by failing to raise trial counsel's decision to waive closing argument, and not to seek a lesser charge, as ineffective assistance of trial counsel.

¶ 12 Williams admitted that the confrontation occurred on a public street, and that he carried a knife with a three inch blade at the time of the confrontation. Therefore, if he committed a battery, he committed an aggravated battery (720 ILCS 5/12-4(b)(8) (West 2004)) and armed violence, a class X crime (720 ILCS 5/33A-2(a), 5/33A-3(a-5), 5/33A-1(c)(2) (West 2004)). The two prior class X felonies of armed robbery then mandated a sentence of natural life in prison. 720 ILCS 5/33B-1(a), (e) (West 2004).

¶ 13 Williams contends that any competent attorney would realize that Williams had only one viable defense to the battery charge, and therefore only one hope for avoiding a sentence of life in prison. Any competent attorney would argue that the court should not make the permissible inference that Perrino suffered bodily harm within the meaning of the battery statute. See 720 ILCS 5/12-3(a)(1) (West 2004). Yet Williams's trial counsel never mentioned the possibility of finding that Williams's conduct did not cause bodily harm, or that Williams acted recklessly and endangered Perrino (720 ILCS 5/12-5(a) (West 2004)). And any competent appellate attorney would have at least argued that Williams's trial counsel provided ineffective assistance by failing to argue the bodily harm issue and suggest lesser offenses for which the court might convict Williams.

¶ 14 We review *de novo* the dismissal of a postconviction petition at the first stage of postconviction proceedings. *People v. Coleman*, 183 Ill. 2d 366, 387-88 (1998). At this stage of proceedings, "a petition alleging ineffective assistance may not be summarily

dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *People v. Hodges*, 234 Ill. 2d 1, 17 (2009).

¶ 15 We find that, especially in light of the mandatory life sentence for a third class X felony conviction, one could credibly argue that defense counsel provided unreasonable assistance when he failed to even suggest that the court might not draw the permissible, but not mandatory, inference that Perrino suffered bodily harm from the punch to his head. See *People v. Bishop*, 218 Ill. 2d 232, 250 (2006). One could also argue that trial counsel's performance fell below an objective standard of reasonableness in that counsel failed to suggest lesser offenses for which the court might find Williams guilty. See *Gregg v. Georgia*, 428 U.S. 153, 199 (1976). Similarly, one could argue that appellate counsel provided ineffective assistance by failing to contend that waiving argument about bodily harm and failing to suggest a lesser offense showed ineffective assistance of trial counsel. See *People v. Gallagher*, 2012 IL App (1st) 101772, ¶ 29.

¶ 16 We also find that one could argue that Williams suffered prejudice due to the arguably unprofessional errors. The record makes the claim for prejudice particularly convincing. The trial court, at the end of the trial, commented that Williams's own testimony proved him guilty of aggravated battery and armed violence. But Williams testified that he only pushed Perrino, and he did not punch him. We do not know of any authority, and the trial court and the parties cite none, to support an inference that a man suffered bodily harm from a push that left the man standing. The trial court's comments show that it did not focus attention on the State's need to prove, beyond a reasonable doubt, that Perrino suffered bodily harm. See *People v. Rotuno*, 156 Ill. App. 3d 989, 992-93 (1987) (state must prove bodily harm);

People v. Calhoun, 404 Ill. App. 3d 362, 387-89 (trial court's remarks show it did not consider relevant factors). Because there is a reasonable probability that the trial court would have reached a less drastic result if Williams's attorney had drawn the court's attention to the bodily harm requirement and suggested that the court need not draw the permissible inference of bodily harm, appellate counsel's failure to argue ineffective assistance of trial counsel at least arguably shows that ineffective assistance of appellate counsel prejudiced Williams. We find that Williams has sufficiently shown prejudice at the first stage for purposes of advancing his postconviction petition to the second stage of postconviction proceedings.

¶ 17 In light of our resolution of the ineffective assistance issue, we need not address the other issues Williams raises in this appeal.

¶ 18 CONCLUSION

¶ 19 In his postconviction petition, Williams adequately alleged that his trial counsel committed unprofessional errors when he failed to argue the bodily harm element of battery and when he failed to suggest a lesser offense for which the court could find Williams guilty. The allegations also adequately support the conclusion that Williams suffered prejudice due to the failings of trial and appellate counsel. Accordingly, we reverse the dismissal of the postconviction petition and remand for further proceedings in accord with this order.

¶ 20 Reversed and remanded.