

2014 IL App (2d) 131041-U
No. 2-13-1041
Order filed March 31, 2014

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Kane County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 11-CF-843
)	
ADAN VENEGAS,)	Honorable
)	John A. Barsanti,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Schostok and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly dismissed defendant's postconviction petition, as defendant did not state the gist of a meritorious claim that counsel was ineffective for advising defendant to forgo testifying and to waive a jury trial, for invoking an outdated standard of reasonable doubt, for failing to impeach the State's witnesses with prior statements, and for failing to raise ineffectiveness on direct appeal.

¶ 2 After a bench trial, defendant, Adan Venegas, was convicted of unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2010)) and sentenced to 24 months' probation. On appeal, this court affirmed. *People v. Venegas*, 2012 IL App (2d) 111279-U. Defendant then filed a petition under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West

2012)), claiming that his trial and appellate attorney, Samuel Partida, had been ineffective. The trial court summarily dismissed the petition. Defendant appeals. We affirm.

¶ 3 We summarize the relevant facts to this appeal. At trial, two Aurora police officers, John Gray and David Bemer, testified for the State. According to Gray, at approximately 12:27 a.m. on April 28, 2011, their marked squad car was following a Chevy Cavalier with four occupants. Defendant was driving. The Cavalier ran a stop sign, then turned and parked in a driveway. Bemer activated the squad car's overhead lights. *Venegas*, 2012 IL App (2d) 111279-U, ¶ 2. Gray testified initially that, as he and Bemer exited the squad car, he observed defendant bend over and reach toward the floorboard area of the driver's seat. However, Gray testified later that he made the observation before he exited the squad car. He could not tell whether defendant was placing something under the seat or reaching for something there. He saw nobody else reach toward the driver's area. *Id.* ¶ 3. Gray testified that both officers exited their squad car, saw open beer cans in the front console of the Cavalier, and ordered the occupants out. Gray received a bag from Bemer. *Id.* ¶ 4. The bag contained 0.3 gram of a substance that later tested positive for cocaine. *Id.* ¶ 7. Gray testified that, before the spotlight came on, it was difficult to see what was happening inside the Cavalier. When he saw defendant bend down, he did not see his hands or any other occupants' hands. He heard no sounds from the car. *Id.* ¶ 5.

¶ 4 Bemer testified that, when he searched the Cavalier, he found the bag “ ‘directly underneath’ ” the driver's seat, in plain view, neither covered by nor sitting on top of anything. *Id.* ¶ 6. Also, he testified, he ascertained that defendant owned the Cavalier. The Cavalier had bucket seats in the front; each was on a track so that it could be moved backward or forward. *Id.*

¶ 5 Defendant put on no evidence. He argued that the State had not proved beyond a reasonable doubt that he had constructively possessed the bag of cocaine. In finding defendant

guilty, the trial court noted that, of the four occupants of the Cavalier, defendant had been closest to the cocaine, which had been found under his seat. Also, he owned the car, and nobody else had been seen making furtive movements toward where the cocaine was found. *Id.* ¶ 8.

¶ 6 On appeal, defendant, represented by Partida, raised only the sufficiency of the evidence. This court affirmed. We explained that, although it was a “close case,” the trial court properly found that the State had proved much more than defendant’s “mere proximity” to the contraband. *Id.* ¶ 11. We noted the evidence that, very shortly after the police started following the Cavalier, defendant ducked down, reaching toward where the cocaine “happened to be found.” *Id.* Further, no other object had been found under the driver’s seat; there was no evidence that defendant had retrieved anything from there; nobody else had been seen reaching toward the area of the driver’s seat; defendant had been closest to the contraband; and he owned the car. *Id.*

¶ 7 On June 18, 2013, defendant filed his petition under the Act, alleging as follows. Based on Partida’s advice, defendant waived his rights to a jury trial and to testify or call witnesses. Partida’s strategy was to argue reasonable doubt, based solely on his belief that the State could not prove constructive possession. His performance was deficient in several respects.

¶ 8 First, according to the petition, Partida failed to cross-examine the State’s witnesses effectively, in that he did not bring out facts showing that defendant’s driving had not been “‘evasive’ ” and he did not object to the State’s assertion in closing argument that defendant had driven evasively after the officers began following him.

¶ 9 Second, the petition alleged, Partida failed to impeach either Gray or Bemmer with prior statements regarding where within the Cavalier the drugs were recovered. At trial, Gray testified that he did not personally see where the drugs were found, as he had been watching the four occupants who had exited the car. Before the grand jury, however, Gray testified that he “ ‘saw

everything happen’ ” and that the recovered drugs were “ ‘shoved between the driver’s seat and center console near the floor.’ ” At trial, Bemer testified that, when he searched the car, he saw that the bag of drugs was located on the floorboard under the driver’s seat. However, in a “synopsis sheet” that he prepared the night of the arrest, Bemer stated that he recovered the bag in the area “ ‘between the driver’s seat and the console on the floor.’ ” Partida had had access to the grand jury transcripts and the synopsis sheet, yet he failed to use them at trial.

¶ 10 Third, Partida failed to raise the problems that the squad car’s lights would have created for Gray in attempting to view what was happening in defendant’s car and whether Gray actually could see “what he thought he saw.” The petition alleged that Partida’s deficient cross-examination “likely strengthened” Gray’s claim that the spotlight enabled him to see clearly what was going on inside the car.

¶ 11 Fourth, Partida had not understood the law of constructive possession; he had argued that the State had to “ ‘exclude every reasonable hypothesis of innocence’ ”—which was no longer the law—and cited numerous cases that were easily distinguishable or outdated. Finally, Partida had been ineffective on appeal, relying on invalid case law and not raising ineffective assistance.

¶ 12 Defendant’s petition asserted that, absent Partida’s errors, it was reasonably probable that the outcome would have been different. The petition noted our statement that “[t]his [was] a close case.” *Id.* ¶ 11. The petition also observed that the case turned heavily on the credibility of the two police officers and their unimpeached testimony that (1) defendant had made furtive gestures; and (2) the drugs had been recovered under the driver’s seat, where defendant had been seen ducking down. Defendant asserted that inquiring more into the circumstances of the stop and impeaching the officers’ testimony with their prior statements would have greatly undermined their credibility.

¶ 13 Defendant's petition attached his affidavit, in which he stated as follows. In preparing for trial, he repeatedly told Partida that he was innocent and had not known about the cocaine until after the police found it. Nobody forced defendant to choose a bench trial, but he did so because Partida assured him that the State would be unable to prove its case. Also, defendant's decision not to testify was based solely on Partida's advice, including his warning that if defendant, who was inexperienced in court, testified, the State would " 'put words in [defendant's] mouth.' " Had he testified, he would have stated that he had not possessed the drugs or hidden them under his seat; that he pulled into the driveway not because of drugs, but because he was driving without a license and there was open beer in the car; and that, when the police shined the light into the car, he hung his head down "in sorrow" because he knew that he was "in trouble for the beer and no license." Defendant had told all the foregoing to Partida, but Partida still convinced him not to testify, because the State could not prove its case.

¶ 14 The petition attached a copy of Bemer's "Police Department Synopsis Sheet." As pertinent here, it stated:

"Upon exiting and approaching the vehicle Ofc Gray observed the defendant make furtive movements. It appeared as if he reached under the driver's side seat. As we made contact with the defendant we observed open Modelo beers in the driver's cup holder and in the rear seat. The defendant was discovered to not have a valid driver's license. Upon searching the vehicle I located a small clear plastic bag with a white powdery substance suspected to be cocaine between the driver's seat and center console on the floor. The driver/defendant denied [*sic*] having any knowledge of the suspected cocaine."

¶ 15 The petition also attached a transcript of Gray’s grand jury testimony of July 19, 2011. As pertinent here, Gray testified as follows. As he approached the Cavalier, he saw defendant appear to be reaching underneath the driver’s seat. Gray saw the open beer container in the cup holder and was aware that defendant had no valid driver’s license. The examination continued:

“Q. At some point you and—well, did both of you search the car?

A. Actually after we got the four subjects out of the vehicle, I stood outside with them. Officer Beamer [*sic*], my partner, is the one that actually searched the interior of the car.

Q. And did he find—let me ask you this: Is everything you are testifying to here either based on your personal knowledge or information you received from another officer?

A. It’s my personal knowledge. I was right there. I saw everything happen.

Q. You were right there. Okay. And when he searched the car, did he find a baggy [*sic*] containing a white powder [*sic*] substance shoved between the driver’s seat and center console near the floor?

A. Yes.”

¶ 16 The trial court dismissed the postconviction petition summarily, explaining as follows. Defendant had signed a valid jury-trial waiver stating that he had knowingly elected a bench trial. Further, upon being informed that defendant planned not to testify, the trial court questioned him, and defendant stated that it was his own voluntary decision. Defendant’s affidavit, attached to the petition, also admitted that the decision had been his own.

¶ 17 The court next addressed the petition’s allegations that Partida had been ineffective, explaining as follows. Partida’s cross-examination of Gray “established the distracting lighting

of the arrest scene, the fact [that] the officers were unable to determine the number of occupants of the vehicle until shortly before the stop, squad lighting did not come on until shortly before the actual stop, the officer could not see the defendant's hands at any time, and *** the console was accessible to all occupants of the car.” Partida’s cross-examination of Bemer had established that Bemer “found the drugs under the drivers [sic] seat which was inconsistent with the officers [sic] synopsis and inconsistent with the testimony [sic] of Officer Gray, and established [that] the drivers [sic] seat was on a track making it difficult or impossible for the driver to place anything under the seat.”

¶ 18 The trial court continued that Partida had made a reasonable closing argument and had emphasized “the facts not observed by the officers and offered alternative explanations of the State’s circumstantial evidence.” Partida made similar reasonable arguments on appeal. The court concluded that defendant had validly waived both his right to a jury trial and his right to testify; that Partida’s assistance had not been deficient; and that any deficiency had not prejudiced defendant. After the trial court dismissed the petition, defendant timely appealed.

¶ 19 On appeal, defendant contends that his petition stated the gist of a meritorious claim that Partida rendered ineffective assistance at trial and on appeal. On an appeal from the summary dismissal of a petition under the Act, our review is *de novo*. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). The petition’s allegations, taken as true and construed liberally, need state only the gist of a meritorious constitutional claim. *Id.* To prevail on an ineffectiveness claim, a defendant must establish that (1) counsel’s performance was objectively unreasonable; and (2) it is reasonably probable that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984); *People v. Manning*, 241 Ill. 2d 319, 326 (2011).

¶ 20 We turn to whether defendant's petition set forth the gist of such a claim. Our scrutiny of counsel's performance must be highly deferential. *People v. Fuller*, 205 Ill. 2d 308, 330-31 (2002). Mistakes in strategy or in judgment do not, in themselves, render representation incompetent. *Id.* at 331. Strategic choices are "virtually unchallengeable," and "that another attorney might have pursued a different strategy, or that the strategy chosen by counsel has ultimately proved unsuccessful, does not establish a denial of ineffective [*sic*] assistance of counsel." *Id.*

¶ 21 Defendant argues first that he set forth the gist of a meritorious claim that Partida was ineffective for improperly inducing him to waive his right to testify. Defendant concedes, as he did in his petition, that Partida did not coerce him into waiving that right and that he had known that the decision belonged to him, not Partida. However, he does contend, as his petition alleged, that he decided to forgo testifying only because Partida unreasonably advised him that testifying would be unnecessary and disadvantageous.

¶ 22 Whether defendant actually raised this claim in his petition is not entirely clear. If not raised in the petition, the claim is forfeited. See *People v. Pendleton*, 223 Ill. 2d 458, 475 (2006). Nothing in the petition alleged directly that Partida was ineffective for advising defendant not to testify. However, the pertinent factual allegations in defendant's affidavit, combined with the petition's allegation that Partida unreasonably relied on his belief that the State's evidence alone was too weak to convict defendant, raised the claim by strong implication. The State does not argue forfeiture, and the trial court did not find that defendant had forfeited a claim that Partida was ineffective for inducing him not to testify. Thus, we address the claim.

¶ 23 As with most strategic decisions, counsel's advice to a defendant on whether to testify is ordinarily not a basis for ineffectiveness. *People v. Youngblood*, 389 Ill. App. 3d 209, 217

(2009). Defendant's assertion that Partida's advice was so unreasonable as to overcome the general rule is not persuasive. Partida's evaluation of the State's case must be viewed from his perspective at the time. See *Strickland*, 466 U.S. at 689; *Manning*, 241 Ill. 2d at 334. We have no basis to question Partida's judgment that defendant would not hold up well under cross-examination. Obviously, Partida was far better able than this court, years later, to decide whether defendant, whatever his probable testimony, would have made a good witness. We cannot say that Partida's decision to rely on the weakness of the State's case was ineffective, unless defendant's petition alleged facts to prove that his testimony would have been so valuable that Partida's decision was unreasonable and prejudicial.

¶ 24 Defendant's petition stated that he would have testified that he entered the driveway not because he was afraid that the police would discover the drugs but because he knew that he was driving without a license and transporting open alcohol. The petition also alleged that defendant would have testified that he bent his head down not because of the drugs but because of how he felt about the other offenses and that he would have denied knowledge of the cocaine.

¶ 25 These allegations were far from compelling. His decision to enter the stranger's driveway was the subject of some testimony, to which the State did refer in its closing argument. However, the State emphasized the more important evidence of defendant's guilt, *i.e.*, his proximity to the cocaine, his furtive gestures preceding the stop, and the fact that he owned the car. More important, in explaining its decision, the trial court did not mention any evasive driving but instead concentrated on these other factors. These were the factors that we noted in holding that the evidence was sufficient.

¶ 26 Defendant's petition and affidavit did, of course, allege that, had he been called, he would have testified about these central evidentiary issues. Nonetheless, defendant's affidavit hardly

refuted the presumption that Partida's advice to defendant to forgo testifying on these matters was reasonable strategy. As the State notes, defendants routinely deny guilty knowledge. Moreover, defendant's explanation of why he bent his head down would have added little, especially as it did not address the apparent reaching motion that Gray reported. Whatever value defendant's testimony might have had, Partida's advice not to provide it does not raise the gist of a claim that his assistance was ineffective.

¶ 27 Defendant's petition also claimed that Partida erred prejudicially in advising defendant to waive his right to a jury trial. Advice on whether to elect a bench trial is ordinarily a strategic decision that will not support a claim of ineffective assistance. *People v. Hobson*, 386 Ill. App. 3d 221, 243 (2008). Both in his petition and on appeal, defendant has made no real effort to show either that Partida's advice was unreasonable or that it was prejudicial. He has never asserted that Partida coerced his decision or arrogated the choice to himself. Nothing defendant has alleged states the gist of a meritorious claim that electing a jury trial would have increased the chance of a more favorable outcome, much less that Partida made an unprofessional error by failing to realize the purported superiority of a jury trial.

¶ 28 Defendant's petition also alleged that Partida was ineffective for misunderstanding the law, as shown by his argument that the State was required to exclude every reasonable hypothesis of innocence (see *People v. Lawrence*, 46 Ill. App. 3d 305, 308 (1977)), a formulation that our courts have long since rejected (see *People v. Pintos*, 133 Ill. 2d 286, 291 (1989)). Defendant's petition asserted that, because he misunderstood the law, Partida underestimated the strength of the State's evidence and overestimated the efficacy of his trial strategy.

¶ 29 We cannot say that defendant's petition established the gist of a meritorious issue on this score. We have reexamined Partida's argument. At one point, he did refer to *Lawrence* and its

outdated statement of the law and contended at some length that, under the evidence, there were reasonable alternatives to finding that defendant constructively possessed the cocaine. On the other hand, Partida correctly stated the elements of constructive possession and directed the trial court's attention to numerous cases that postdated *Pintos* (although they were ultimately distinguishable, as we eventually held).

¶ 30 Most important, our examination of the record persuades us that Partida approached the issue of constructive possession cogently and thoroughly, although unsuccessfully. The substance of his argument was based on the same pertinent considerations that any reasonable defense attorney would have discussed—the gaps in the State's evidence, especially Gray's testimony about defendant's furtive movements; the presence of several other people in the car and their access to where the cocaine was recovered; and the absence of direct evidence connecting defendant to the cocaine. Whatever the theoretical difference between the pre-*Pintos* and post-*Pintos* glosses on reasonable doubt, we see no basis to infer that Partida's doctrinal lapse meaningfully affected his argument, much less his trial strategy.

¶ 31 We turn to the final ground on which defendant's petition based its claim that Partida had been ineffective at trial: his failure to impeach the State's witnesses with their prior statements, which, defendant asserted, were inconsistent with their trial testimony.

¶ 32 Defendant's petition asserted that Partida was ineffective for failing to use Gray's grand jury testimony for impeachment. At trial, Gray testified that he did not personally see where the cocaine was found. The petition relied on the grand jury testimony to allege that, at the earlier proceeding, Gray testified that he had seen Bemmer recover the cocaine, which had been (in the prosecutor's words) “ ‘shoved between the driver's seat and center console near the floor.’ ”

¶ 33 Defendant’s petition also asserted that Partida was ineffective for failing to use Bemer’s synopsis sheet to impeach him. At trial, Bemer repeatedly testified that the bag of cocaine had been located on the floor underneath the driver’s seat; indeed, on cross-examination, he used the term “directly underneath.” However, in his synopsis sheet, Bemer stated that the bag was “between the driver’s seat and center console” on the floor. The statements did conflict; the plain meaning of “directly underneath the driver’s seat,” a response that Partida elicited himself, is very different from that of “between the driver’s seat and the center console.” The statements related to a crucial factual matter, the location of the bag. On appeal, defendant contends that the petition raised the gist of a claim that Partida had been ineffective for failing to use the officers’ prior statements to attack their credibility, especially as it related to the location of the cocaine.

¶ 34 In finding defendant guilty, the trial court stressed that he had been closest to the cocaine although it also noted that defendant had made furtive movements and had owned the car. *Venegas*, 2012 IL App (2d) 111279-U, ¶ 8. We noted all of this evidence in affirming defendant’s conviction, but we too emphasized the location of the cocaine, which was not only probative in itself but also consistent with Gray’s testimony that defendant had been reaching down toward the area of the driver’s seat (although Gray had not actually seen defendant’s hands (*id.* ¶ 5)). *Id.* ¶ 11.

¶ 35 Nonetheless, we cannot conclude that the petition raised the gist of a meritorious claim of ineffective assistance. As the State contends, Partida had a strategic basis to forgo any challenge to Bemer’s trial testimony that the cocaine was stored directly underneath the driver’s seat. In closing argument, Partida contended that, according to the evidence, it was plausible that another occupant of the car had placed the cocaine under the driver’s seat. He reasoned:

“We know that this driver’s seat is on a track so it moves and so therefore, it is reasonable to explain that access to that driver’s seat also access [sic] from the rear, from the rear of the seat. What we have heard is that the cocaine was in plain sight underneath the seat. I would submit to Your Honor that that is an oxymoron. If the cocaine was underneath the driver’s seat, it’s not in plain sight in the normal, ordinary way that we use *** that word.”

¶ 36 Partida continued that the evidence cast serious doubt on whether Gray had actually seen defendant make a furtive movement toward the underside of the driver’s seat. More important:

“[I]t’s going to be very difficult for the Officer [sic] behind that vehicle being able to identify and see what’s going on inside of that car. Very difficult to see if individuals are passing around a packet of cocaine, very difficult and impossible to see where that cocaine could have been originated from, who’s [sic] pocket it could have originated from, and *impossible to see if there’s an individual in the back seat using his feet, hands, or otherwise to scoot the packet of cocaine under the driver’s seat.* It’s impossible to make those observations, given the testimony that we’ve heard.” (Emphasis added.)

¶ 37 Partida’s trial strategy was to create a reasonable doubt by arguing that defendant had never been aware of the cocaine, much less intended to exert control over it. To do this, he raised the possibility that one of the two passengers in the backseat had hidden the bag under the driver’s seat. This theory was not unreasonable, especially given the evidence that the front seat was on a track and that the officers would have had difficulty observing the backseat passengers moving their hands. To pursue this theory, Partida had to concede that the cocaine was found under the driver’s seat. Thus, it becomes apparent why he did not introduce evidence that the cocaine had actually been found between the driver’s seat and the front center console. Not only

would this undermine the theory that a backseat passenger had tried to conceal the cocaine, but it would have supported finding that the bag had been stored where defendant could have seen it.

¶ 38 Of course, we know in hindsight that Partida's strategy was unsuccessful and that, in finding defendant guilty, the trial court emphasized that the cocaine had been found directly underneath defendant's seat. Nonetheless, the failure of Partida's strategy did not make it a basis for a meritorious claim of ineffectiveness. There were sound reasons to concede that the cocaine had been recovered in an area accessible to two passengers and hidden from defendant. All agreed that the cocaine was found *somewhere* inside the car. From the record before us, the only possible places were directly underneath the driver's seat and between the driver's seat and the center console. Had the court heard the evidence that the cocaine was recovered from the latter spot, that might well have contributed to a finding of guilty by tending to prove that the cocaine had been placed closer to defendant than to the other occupants *and* within his sight. Partida's choice of theories was trial strategy and does not support a claim of ineffectiveness.

¶ 39 Defendant also contended that Partida was ineffective on appeal for failing to raise a claim of ineffective assistance at trial. As we have held that defendant did not raise the gist of a meritorious claim that Partida was ineffective at trial, we conclude that his claim of ineffectiveness on appeal also was insufficient to survive summary dismissal.

¶ 40 For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed.

¶ 41 Affirmed.