2015 IL App (1st) 130797-U

FIRST DIVISION
April 20, 2015

No. 1-13-0797

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.	)	No. 06 CR 6907
	)	
MARTIN McCOY,	)	Honorable
	)	Ellen Beth Mandeltort,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

ORDER

¶ 1 ***Held*:** The circuit court's second-stage dismissal of defendant's *pro se* postconviction petition was affirmed where defendant failed to make a substantial showing that his trial counsel was ineffective for failing to file a motion to suppress defendant's custodial oral statement to police.

¶ 2 Defendant Martin McCoy appeals from the second-stage dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010). On appeal, defendant contends he made a substantial showing that his trial counsel was ineffective for failing to file a motion to suppress his oral statements to law enforcement authorities while in police custody. We affirm.

¶ 3 Defendant was convicted of first degree murder after running over Frances McCoy, his estranged wife, with his sports utility vehicle (SUV) in Hoffman Estates about 3:30 p.m. on February 17, 2006. At trial, defendant admitted that he hit Frances with his SUV but maintained it was an accident. After being instructed as to both first degree murder and involuntary manslaughter, the jury found defendant guilty of first degree murder. The trial court subsequently imposed a 35-year term in prison. This court affirmed the judgment on appeal. *People v. McCoy*, No. 1-07-1140 (2009) (unpublished order under Supreme Court Rule 23).

¶ 4 At trial, three eyewitnesses testified to the events that followed: Yokovanda Smith, Dante Craddock, and Christopher Jones. Craddock viewed the incident while sitting in his car about 35 feet away. Jones witnessed the incident from the balcony of his second-floor apartment about 60 feet away. The three witnesses saw defendant retrieve a long metal object from his trunk; Yokovanda identified the object as a golf club. Defendant walked to the passenger side of Frances's car and used the golf club to smash the front passenger window where Yokovanda was sitting. Defendant returned to his car and Frances followed him. Frances moved to the back of the SUV and called 9-1-1. Craddock heard her read the SUV's license plate to the person on the phone. Yokovanda heard defendant say, "Bitch, I'm going to run you over." Craddock also heard defendant say, "I'm going to run you over" and called Frances a "bitch." Defendant put the SUV into reverse gear and backed up very fast, striking Frances. Defendant then shifted the SUV into forward gear and struck her again; the SUV ran over her. Defendant sped away without stopping.

¶ 5 Later that afternoon defendant went to the Elgin Police Department to report the accident. Two Hoffman Estates detectives, Russman and McGowan, brought defendant from Elgin to the Hoffman Estates police station where they interviewed defendant at 6:45 p.m. Russman testified

at trial that defendant was advised of his rights and he signed a waiver-of-rights form. Defendant told Russman that he was supposed to meet his estranged wife at about 3 p.m. on that day to talk about their seven-year-old child. At about 3:30 p.m. he saw Frances and Yokovanda Smith exit Frances's Hoffman Estates apartment building. He positioned his SUV so as to block Frances's car because he did not believe he was going to stay long. Defendant retrieved a golf club from the rear of his vehicle, walked to the front passenger side of Frances's car, and struck the window with the club while Yokovanda Smith was sitting in the car. Defendant returned to his SUV. Frances came up to the SUV's driver's side and began striking his car, and they began to argue. Frances walked to the rear of his SUV and began kicking it. Defendant attempted to leave and put the car in reverse, causing Frances to move out of the way. Then Frances went to a grassy median area. Defendant then intentionally drove his SUV toward Frances in an effort to scare her, but he was unable to stop because the floor board of the SUV was cluttered with paper and garbage. Defendant then drove from the scene because he was scared.

¶ 6 Russman also testified that on the evening of February 17, defendant was interviewed by an assistant State's Attorney (ASA) in Russman's presence. Defendant's statement to the ASA was similar to what he had told Russman and McGowan earlier. The conversation was not tape-recorded.

¶ 7 ASA Karen Crothers testified that she and Russman spoke with defendant at about 9 p.m. on February 27. Crothers showed defendant the preprinted Hoffman Estates waiver of rights that he had initialed and signed earlier. She read it to him and asked if he understood each part. She also added her signature and the date and time she read it to him. Crothers testified that she had only "a very brief conversation" with defendant lasting about seven minutes. She did not take notes. She asked defendant what had happened that day. He told her he had gone to Frances's

apartment and waited for her to come out of the building. They had a verbal argument. Defendant went to his car, retrieved a golf club, and smashed her car window. Then he returned to his vehicle and struck Frances with the vehicle. Defendant never told Crothers that he struck Frances accidentally or deliberately or that he did not intend to strike her.

¶ 8 Another State witness, an expert in accident reconstruction, testified at trial that the physical evidence showed that at the time the victim was struck, defendant was accelerating while steering the vehicle in a particular direction.

¶ 9 Defendant testified that he and Frances were separated but he would still see their daughter and his step-son weekly at Frances apartment. He and Frances had prearranged a meeting for him to see the children on Friday, February 17, 2006, and he arrived at Frances's apartment building at 3:15 p.m. Petitioner parked his SUV in the visitors' parking area and called Frances to let her know he had arrived. She did not answer, so he left a message and then a second message. He began driving his SUV toward Atlantic Avenue when he saw Frances and Yokovanda Smith exit the building. Frances called to defendant so he returned to the parking lot. He parked his SUV just short of the back of Frances's parked car because he thought he would be there just a short time. He and Frances conversed about the children and money, and defendant became frustrated with the conversation. He got a golf club out of the back of his car and swung it at Frances's passenger window, shattering the entire window. He returned the club to his SUV, apologized, and told Frances to send him the bill. Defendant got back into his SUV and told Frances to stop hitting his passenger side windows. Frances was moving toward the back of the SUV, and defendant told her in a loud voice to get away from his vehicle before she got hit. He paused to wait for Frances to get out of the way and then put the SUV in reverse. He backed up carefully to make sure Frances was not struck, but he did not look back to see whether

she was directly behind the SUV, although a quick glance alerted him to a white man smoking a cigarette who was to the left of him; defendant thought that person was Frances. He saw "someone" on the driver's side back left of his car, so he put the car in reverse and hit the gas. He initially backed up because he thought Frances was by her car and did not see her by his SUV. He thought she was out of the way. He hit the brakes when he realized the person he had seen out of the corner of his eye was not Frances, but the white man smoking a cigarette. He did not know how far he reversed the car because he was just trying to get out of there, but thought it was perhaps 20 feet.

¶ 10 After defendant backed up, he became nervous and just wanted to get out of the situation, so he tried to leave by trying to drive across the grassy median to leave the parking lot. When driving forward, he did not know his speed as he was just trying to leave as fast as possible. He did not know Frances was in his path until the point of impact. "I just saw Frances right before I hit her." He felt his car travel over the median and did not know what to do when he stopped after realizing he hit Frances. He froze and screamed out; he stopped at the end of the entrance and looked back. He did not get out of the car to check on Frances because he did not want to "cause a further scene." He saw people attending her and did not want to turn around because he was scared. He called his friend Jamal Turner and his brother, telling them he accidentally hit Frances. Then he drove to the police station in Elgin because he did not know where the Hoffman Estates Police Department was located. After being transferred to the Hoffman Estates Police Department, he did not tell detectives that he was just trying to scare Frances and did not provide them with a handwritten statement. "I just told them the details of the accident, and I told them that I had accidentally hit my wife. And that was it." He did not tell the detectives that he was trying to scare Frances. He was never given a written statement to review that

contained the statements he had made to the detectives. He claimed that he never did anything that day to deliberately cause physical harm to Frances.

¶ 11 A few hours after his conversation with the detectives, defendant had a conversation with the ASA, a tall Caucasian woman with dark hair. The two detectives were also in the room with her. Defendant "just gave her a brief summary of the same thing I told the other detective." She did not give him a written statement to review.

¶ 12 At the close of the trial, the jury was instructed as to both first degree murder and involuntary manslaughter. In closing argument to the jury, defense counsel told the jurors that they must acquit defendant because he did nothing wrong. The only alternative under the facts, defense counsel argued, was that defendant acted recklessly, so the appropriate verdict would be involuntary manslaughter. The jury returned a guilty verdict of first degree murder. Defendant was sentenced to 35 years in prison.

¶ 13 On direct appeal, defendant argued that his sixth amendment right to confrontation was violated when out-of-court statements by Frances were admitted at trial, and that he was not proven guilty beyond a reasonable doubt. This court affirmed his conviction and sentence.

¶ 14 Following his unsuccessful direct appeal, defendant filed his *pro se* postconviction petition alleging, *inter alia*, that Detectives Russman and McGowan refused his request for an attorney, threw him against the wall, and drew their guns to force him to sign a statement that the detectives had drafted for him to sign. Defendant filed a *pro se* supplemental petition which incorporated the claims in his original petition and added new claims, including the allegation that the State procured defendant's conviction by knowingly using at trial, the perjured testimony of ASA Karen Crothers in regard to a purported "confession of guilt statement" it knew defendant did not make to her, and that defendant had merely signed a waiver of his *Miranda*

rights. In support of his allegation, defendant appended to the supplemental petition Russman's police department follow-up report in which he stated that at 2110 hours on February 17, 2006, "Martin McCoy refused to talk to this Investigator and ASA Crothers about this case." Defendant also attached his own affidavit averring that at 9:10 pm on February 17, in the presence of Russman and defendant, Crothers signed her name on the waiver of rights form, defendant re-signed his name under hers, and Russman also signed it. "[A]fter I re-signed the Hoffman Estates Police Department Waiver of Rights Form, I did not have any conversation with either Detective Harry Russman or ASA Crothers. More specifically, at their behest, on said time and date, I refused to talk to them about this case." Defendant also alleged that trial counsel was ineffective in failing to object during trial or in a post-trial motion to the State's knowing use of Crothers's perjured testimony about a statement he never made.

¶ 15 On February 3, 2012, defendant's appointed postconviction counsel filed a motion to withdraw as defendant's postconviction counsel pursuant to *People v. Greer*, 212 Ill. 2d 192 (2004). The motion, which the circuit court granted, stated in pertinent part that defendant's trial counsel "was not ineffective in failing to file a motion to suppress statements where the statement sought to be suppressed was that McCoy admitted to striking the victim with his vehicle. McCoy testified to same at trial, adding that his action was accidental." On April 27, 2012, counsel filed a certificate in accordance with Supreme Court Rule 651(c) (eff. Apr. 26, 2012).

¶ 16 After counsel withdrew, defendant proceeded *pro se*. In November 2012 defendant filed another supplement to his postconviction petition entitled "Motion for Judicial Review – Leave to Supplement" setting out several claims, including the repeated allegation that the Hoffman Estates police forced him at gunpoint into a coerced confession and that he told his trial counsel

of the coercion at the police station. Defendant attached to the supplemental document an affidavit in support of the coerced confession claim.

¶ 17 The State filed a motion to dismiss defendant's postconviction petition as supplemented and the circuit court granted the State's motion. The court's written order found, *inter alia*, that defendant's allegations of ineffective assistance of counsel failed to satisfy either prong of the test established in *Strickland v. Washington*, 466 U.S. 668, 690 (1984).

¶ 18 On appeal, defendant asserts that his postconviction petition made a substantial showing that his trial counsel was ineffective for failing to file a motion to suppress his in-custody statements. He contends counsel's failure to seek suppression of the statements was objectively unreasonable and prejudiced him because his in-custody statements "were the State's strongest evidence of his intent" to kill the victim.

¶ 19 As an initial matter, the State contends that defendant has forfeited his claim of ineffective counsel by failing to raise it on appeal. Defendant replies to the State's forfeiture argument by noting that his claim of ineffective counsel is based almost exclusively on evidence outside the record on direct appeal, including his own affidavit averring that he was coerced into making a statement to the police and that he told his trial counsel of the coercion. Where the disposition of a defendant's claim of ineffective assistance of counsel requires consideration of matters beyond the record on direct appeal, it is more appropriate that defendant's claim be addressed in a postconviction proceeding, and an appellate court may properly decline to adjudicate the claim in his direct appeal. *People v. Kunze*, 193 Ill. App. 3d 708, 725-26 (1990); *People v. Morris*, 229 Ill. App. 3d 144, 167 (1992). Consequently, defendant did not forfeit the issue by failing to raise it in his direct appeal where omissions in the record made it more appropriate for collateral review.

¶ 20 At the second stage of a proceeding under the Act, the defendant bears the burden of making a substantial showing of a constitutional violation. *People v Pendleton,* 223 Ill. 2d 458, 473 (2006). The denial of a postconviction petition without an evidentiary hearing is reviewed *de novo*. *People v. Simms*, 192 Ill. 2d 348, 360 (2000).

¶ 21 Claims of ineffective assistance of counsel are evaluated under the two-prong test established in *Strickland*. Under that test, the defendant must demonstrate that (1) counsel's performance was objectively unreasonable compared to prevailing professional standards, and (2) a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Patterson*, 2014 IL 115102, ¶ 81.

¶ 22 To establish deficient representation under *Strickland*'s first prong, defendant must overcome the strong presumption that his counsel's action or inaction was the result of sound strategy. *Id.*; *People v. Campbell*, 2014 IL App (1st) 112926, ¶ 38. The decision of whether to file a motion to suppress a defendant's in-custody confession is a matter of trial strategy (*id.*) which is immune from claims of ineffective assistance of counsel (*People v. Martinez*, 348 Ill. App. 3d 521, 537 (2004)). To prevail on a claim that his trial counsel was ineffective for failing to file a motion to suppress statements, the defendant must show that a reasonable probability exists both that the motion would have been granted and that the outcome of the trial would have been different if the statement had been suppressed. *Id.*

¶ 23 Satisfying the prejudice prong of *Strickland* requires a showing of actual prejudice and not simply speculation that the defendant may have been prejudiced. *Id.* Defendant must prove there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v. Johnson*, 218 Ill. 2d 125, 143-44 (2005). A "reasonable probability" is defined as a demonstration sufficient to undermine confidence in the outcome,

rendering the result unreliable or fundamentally unfair. *Martinez*, 348 Ill. App. 3d at 537, citing *People v. Evans*, 209 Ill. 2d 194, 220 (2004). The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Clendenin*, 238 Ill. 2d 302, 317-18 (2010).

¶ 24 We agree with the State that defendant has failed to satisfy either prong of the *Strickland* test. We view trial counsel's decision to forego seeking suppression of the in-custody statement to be one of sound trial strategy. Three eyewitnesses testified for the State that defendant struck Frances with his SUV, a fact conceded by defendant's own trial testimony. The only critical issue left to be determined at trial was whether defendant's action in running over the victim was intentional, so as to provide the *mens rea* for murder.

¶ 25 Detective Russman testified that defendant made an in-custody statement to him that when Frances moved to a grassy median in the middle of the parking lot, defendant "intentionally then drove his vehicle toward Frances in an effort to scare her," but he was unable to stop the SUV "because the floor board of his vehicle was cluttered with papers and garbage." Defendant contends that this statement was "the only direct evidence that he *deliberately* accelerated in Frances's direction" (emphasis in original) and that without that evidence, the jury might have returned a guilty verdict of involuntary manslaughter. We disagree. The statement was the only direct evidence that defendant attempted to engage the SUV's brakes when it was moving forward toward Frances. We interpret the statement to mean that defendant deliberately intended only to scare Frances, not to harm her. Thus, the statement was not inculpatory as to the intent required for first degree murder.

¶ 26 There was an exculpatory element in the statement that defendant's trial counsel was justified in using. The statement showed that defendant acted recklessly in trying to scare

Frances without being able to brake the vehicle as it moved forward toward her. Consequently, the statement established a middle ground between accident and murder that justified an involuntary manslaughter jury instruction and gave defense counsel the opportunity to argue for a compromise verdict. Defense counsel argued in closing argument to the jury: "And certainly if there was anything that was done here that was violative of any law, it would have to be involuntary manslaughter." It was reasonable for defense counsel to forego seeking suppression of the statement where, in significant part, it supported defendant's theory of recklessness and involuntary manslaughter. We conclude that defendant has failed to make a substantial showing of ineffective representation by his trial counsel pursuant to the deficient performance prong of *Strickland*.

¶ 27 Even if defendant's trial counsel had filed a motion to suppress defendant's statement to police detectives and the circuit court had granted the motion, we cannot find that there is a reasonable probability the result of the trial would have been different. The remaining trial evidence was sufficient—indeed, it was overwhelming—to support the jury's verdict that defendant was guilty of first degree murder. The State proffered testimony of three eyewitnesses establishing that the victim's death occurred as a result of being struck by defendant's SUV after defendant had angrily smashed a window of her car with a golf club. Two of the witnesses testified that defendant struck the victim with his vehicle, not once but twice, immediately after calling her a bitch and telling her, "I'm going to run you over." Further, the expert in accident reconstruction testified that when the SUV struck Frances, defendant was accelerating and aiming the SUV in her direction. We conclude that defendant failed to satisfy the prejudice prong of the *Strickland* test.

¶ 28 Defendant contends in this appeal that his counsel was ineffective for failing to move for suppression of his "statements" and he includes the statement defendant made to ASA Crothers in the police station on the night of the incident. However, neither defendant's original petition nor its supplements argued that his statement to Crothers was coerced or incriminating, or that his trial counsel was ineffective for failing to move to suppress it. Under general principles of procedural default, a defendant forfeits appellate review of any issue not raised in his petition for postconviction relief. *People v. Pendleton*, 223 Ill. 2d 458, 475 (2006). In fact, a supplement to defendant's petition charged that he never gave a statement to Crothers, that he refused to do so, and that her trial testimony that defendant gave her a brief statement about the incident was perjured. "A party is estopped from taking a position on appeal that is inconsistent with a position the party took in the trial court." *People v. Major-Flisk*, 398 Ill. App. 3d 491, 500 (2010). As defendant took the position below that he did not give a statement to Crothers, he is now estopped from arguing the contrary on appeal.

¶ 29 Nevertheless, even assuming the claim was included in defendant's pleadings and was properly raised, the content of defendant's oral statement as testified to by Crothers is virtually the same as the content of defendant's oral statement to police detectives. Accordingly, our conclusion would remain the same—defendant failed to make a substantial showing of ineffective representation by his trial counsel for failing to file a motion to suppress the statements.

¶ 30 The circuit court properly determined that defendant's postconviction petition and its supplements failed to make a substantial showing of a violation of his right to effective assistance of counsel. Accordingly, we affirm the judgment of the circuit court.

¶ 31 Affirmed.