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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 19729
)	
RUSSELL OZMINKOWSKI,)	Honorable
)	Colleen Ann Hyland,
Defendant-Appellant.)	Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court's dismissal of the defendant's second-stage postconviction petition is affirmed, where counsel's failure to seek suppression of the defendant's post-arrest statements as involuntary due to the defendant's intoxication was not ineffective, but a matter of sound trial strategy.

¶ 2 The defendant, Russell Ozminkowski, appeals from the second-stage dismissal of his petition for postconviction relief under the Post Conviction Hearing Act (Act) (725 ILCS 5/122 *et seq.* (West 2010)). The defendant contends his petition made a substantial showing that (1) trial counsel was ineffective for failing to file a motion to suppress statements he made to the

police; and (2) appellate counsel was ineffective for failing to argue that trial counsel's forfeiture of the issue amounted to plain error. For the reasons that follow, we affirm.

¶ 3 This case arises from an August 7, 2005, incident where Lawrence Edgeworth was shot and killed by the defendant while visiting the defendant's home. Following a jury trial, the defendant was found guilty of first degree murder. We affirmed the defendant's conviction on direct appeal. *People v. Ozminkowski*, No. 1-08-0977 (2010) (unpublished order under Supreme Court Rule 23). Because the facts in this case were detailed in our prior order, we set forth only those facts necessary for the disposition of this appeal.

¶ 4 Prior to trial, the defendant filed a motion to suppress statements he made to the police in the hours following the shooting. The motion alleged, in relevant part, that the defendant made the statements without being advised of his *Miranda* rights. See *Miranda v. Arizona*, 384 U.S. 436 (1966). Although the motion noted that the defendant had demonstrated a 0.346 blood-alcohol-concentration (BAC) level in a breathalyzer test taken at the police station, the motion did not assert that the defendant's statements were rendered involuntary as a result of his intoxication.

¶ 5 At the hearing on the motion to suppress, Officer Nick Pienta testified that, at approximately 1:30 a.m. on August 8, 2005, he was dispatched to the defendant's residence in response to a call that a homeowner had shot an intruder. Upon his arrival, the defendant showed Officer Pienta Edgeworth's body as well as the gun that was used in the shooting. Thereafter, the defendant accompanied Officer Pienta to the police station for an interview. When the defendant and Officer Pienta arrived at the station, the officer took the defendant to a windowed "report room" where they spoke for approximately two hours. The parties disputed, for purposes of the motion to suppress, whether the defendant had consented to accompanying

Officer Pienta to the station or whether he was in custody at this time. According to Officer Pienta, the defendant was "cooperative" throughout the interview process.

¶ 6 Officer James Twohill testified that, at about 7 a.m. on August 8, 2005, he and another detective met the defendant in an interview room and conducted a videotaped interview. Throughout the interview, the defendant provided responsive, lucid, expressive, detailed and relaxed responses to the officers' questions without noticeable hesitation or delay. The videotape, which was viewed by the trial court at the suppression hearing, depicts Officer Twohill and the other detective introducing themselves and telling the defendant that they wanted to "talk to [him], get [his] side of the story, and then *** get [him] outta [the police station]." The defendant told the officers that he consumed 12 beers during the day and went to bed around 11 p.m. He awoke during the night to the sound of rustling. The defendant said that he "grabbed [his] gun" and observed an intruder approach his bedroom. He pointed his gun at the intruder and ordered him to leave. When the intruder refused, the defendant pushed him and hit him in the arm with the gun. The intruder continued to push forward (or braced himself in position) and refused to leave. The defendant gave the intruder "four chances to get out of the house" before shooting him. The defendant told the officers that he had never seen the intruder before and that he had had no visitors to his home in the previous two weeks. He also said that he believed the intruder was inebriated and had difficulty standing. Although the intruder surprised the defendant, the intruder had nothing in his hands. The defendant explained that his goal during the encounter was to get the intruder out of his home. The defendant also mentioned that his gun has a "hairpin trigger," but he did not accidentally shoot the intruder.

¶ 7 After hearing the defendant's account, the officers asked him questions designed to ascertain the intruder's motive for entering his home. They reiterated that they would allow the

defendant to leave once they had obtained his version of the events leading to the shooting. Officer Twohill testified that he received information that the defendant and Edgeworth were friends. After learning this fact, Officer Twohill returned to the interview room and read the defendant his *Miranda* rights. The defendant demanded counsel and refused to answer any more questions. However, he subsequently gave additional statements to another detective. Based upon this evidence, the trial court entered an order suppressing only those statements made by the defendant after he invoked his *Miranda* rights.

¶ 8 Also before trial, the State filed a motion to bar the defendant from presenting the testimony of Dr. Christopher Long, a forensic toxicologist, regarding the effect of the defendant's intoxication at the time of the shooting and during his conversations with police. At the hearing on the motion, Dr. Long testified that he believed the defendant showed "tolerance" for alcohol but was nonetheless impaired. Dr. Long opined that this impairment would have affected the defendant's ability to recall events of the previous night, to process information, and to make decisions. He also explained that the defendant's intoxication could have left him open to suggestion during the police interview and that his condition rendered his statements to the police "suspect." Dr. Long opined that, if the defendant had been awakened on the morning of the shooting, it was possible that his intoxication affected his ability to recall events a few hours earlier.

¶ 9 In ruling on the State's motion, the trial court barred the defendant from presenting Dr. Long's testimony to prove that, at the time of the shooting, he acted under an unreasonable belief that his actions were justified. However, the court allowed the defendant to present testimony from Dr. Long to impeach the reliability of the defendant's statements to police.

¶ 10 At trial, Mark Linn, a longtime acquaintance of the defendant, testified that, on the night of the shooting, he and Edgeworth drove to the defendant's home so that the three could socialize. Linn stayed at the defendant's home for about 90 minutes until shortly after midnight. According to Linn, when he left, the defendant and Edgeworth continued to socialize, and the defendant gave Edgeworth permission to spend the night at his home.

¶ 11 Officer Pienta testified consistently with his testimony at the suppression hearing. He added that the defendant "said that he had been woken up by some noises" and "saw a man he did not know standing in the hallway." The defendant stated that the man confronted him and a struggle ensued, at which point his gun went off accidentally, shooting the man in the chest. Officer Pienta retrieved the gun and called an ambulance for the victim. Thereafter, with the defendant's consent, Officer Pienta drove him to the police station.

¶ 12 After the State played the video of the defendant's videotaped statement, it presented forensic and pathology evidence linking the gun retrieved from the defendant's home to Edgeworth's death.

¶ 13 In his own defense, the defendant presented the testimony of Margaret Edgeworth, Edgeworth's cousin, with whom Edgeworth had been staying at the time of the shooting. Margaret testified that, on the night of the shooting, Edgeworth had telephoned her at 11:58 p.m. and asked her to "leave the door unlocked [because] he would be coming home."

¶ 14 The jury returned a verdict finding the defendant guilty of first degree murder. The defendant's postjudgment motion was denied and the court sentenced him to 45 years' imprisonment.

¶ 15 On direct appeal, the defendant argued, *inter alia*, that (1) his trial counsel was ineffective for failing to call Dr. Long to testify regarding the effect of the defendant's

intoxication on the reliability of his statements to police; and (2) his statements to police should have been suppressed because they were given involuntarily. We rejected the defendant's first argument, concluding that trial counsel's decision to forego presenting Dr. Long's testimony was a matter of sound trial strategy. *Ozminkowski*, No. 1-08-0977, at 15-16. As to the second claim, we found the defendant forfeited the issue by failing to raise it in his motion to suppress. *Id.* at 17. Although the motion referenced the results of his breathalyzer test, it said nothing further about those results or how they may have affected the voluntariness of the defendant's statements. *Id.* at 21. In addition, we pointed out that the defendant's appellate counsel had failed to avoid forfeiture of the issue by invoking the plain-error rule.

¶ 16 The defendant then filed the postconviction petition at issue in this appeal. In his petition, the defendant alleged that his trial counsel was ineffective for failing to assert in the motion to suppress that his statements were involuntary due to extreme intoxication. Defendant also alleged his appellate counsel was ineffective for not arguing that trial counsel's failure to assert the involuntariness issue amounted to plain error. The defendant supported his petition with an affidavit from his brother, Randy Ozminkowski.

¶ 17 Randy's affidavit stated that the defendant was an alcoholic and would drink 24 bottles of beer per day. In the weeks leading up to the shooting, the defendant alienated himself from family and friends, became depressed, stopped eating, and consumed alcohol in order to self-medicate. Randy also stated that the defendant exhibited alcohol-withdrawal symptoms (*i.e.*, shaking) during his interview with the police and was eventually taken to the hospital for treatment. Additionally, Randy summarized his interactions and conversations with the defendant's trial counsel. He stated that trial counsel assured the defendant and his family that he

would try to suppress defendant's statements. However, counsel never obtained hospital records or addressed the significance of the defendant's intoxication.

¶ 18 The State filed a motion to dismiss the petition alleging, in relevant part, that counsel's decision not to seek suppression of the defendant's statements to the police given prior to his invocation of his *Miranda* rights was a matter of reasonable trial strategy. The circuit court granted the State's motion, and this appeal timely followed.

¶ 19 Under the Act, individuals convicted of criminal offenses may challenge their convictions on grounds of constitutional violations. 725 ILCS 5/122-1 *et seq.* (West 2010). The Act sets forth three stages of review. If a postconviction petition is not dismissed at the first stage, it advances to the second stage. At the second stage, counsel may be appointed to an indigent defendant and the State may file a motion to dismiss or an answer to the petition. 725 ILCS 5/122-4, 122-5 (West 2010). At this stage, the trial court must determine whether the petition and any accompanying documents make a substantial showing of a constitutional violation. *People v. Domagala*, 2013 IL 113688, ¶ 33. We review the dismissal of the defendant's postconviction petition *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009).

¶ 20 In this case, the defendant alleges ineffective assistance of trial and appellate counsel. Claims of ineffective assistance are governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Albanese*, 104 Ill. 2d 504, 526 (1984) (adopting *Strickland*). To prevail on a claim of ineffective assistance, a defendant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. More specifically, a defendant must show that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different." *Id.* at 694. Since the right to effective assistance of counsel refers to competent, not perfect, representation, mistakes in trial strategy or tactics do not, in and of themselves, equate to incompetent representation. *People v. Fuller*, 205 Ill. 2d 308, 331 (2002). Under *Strickland*, trial counsel has a professional duty to conduct "reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. Strategic choices made after an investigation are "virtually unchallengeable." *Id.* at 690. Counsel's reasonable decision on strategy does not fall below prevailing norms merely because the strategy did not succeed. *People v. Minniefield*, 2014 IL App (1st) 130535, ¶ 89.

¶ 21 In this case, the defendant essentially reiterates the points he made in support of his ineffective assistance claim on direct appeal. Specifically, he asserts that his intoxication impaired his thought processes and memory and made him subject to influence by Officer Pienta and other officers. The defendant makes no argument that his statements were extracted as a result of force, coercion or intimidation; rather, he simply argues that his will was overcome by the effect of the intoxication itself. He concludes, therefore, that his trial counsel should have moved to suppress his statements to police as involuntary.

¶ 22 As we observed on direct appeal, however, counsel's decision not to pursue the suppression of the defendant's statements to Officer Pienta must be considered reasonable trial strategy. Our review of the record shows that the defendant did not appear to be so debilitated when he spoke to Officer Pienta that his statements were incoherent or fanciful. At the suppression hearing, Officer Pienta testified that the defendant was "cooperative" throughout the interview. Indeed, the videotaped interview reveals that the defendant had consented to the interview and provided responsive, lucid, detailed and relaxed responses to the officers' questions, without noticeable hesitation or delay. On this record, trial counsel could have

reasonably concluded that a motion to suppress on the basis of the defendant's intoxication would have proved fruitless.

¶ 23 Further, and more importantly, the suppression of the statements would have been detrimental to the defense. At trial, the defendant did not dispute that he purposefully shot Edgeworth on the night in question. Rather, his theory was that he believed Edgeworth was an intruder and he shot him in self-defense. The only way for counsel to present this theory of self-defense, aside from asking the defendant to testify, was through the defendant's statements to the police. Although the self-defense theory proved to be unsuccessful, this, standing alone, does not establish that counsel's performance was ineffective. The defendant has failed to articulate an alternative theory of the case or point to other evidence that would have created a more viable defense. For this reason, we are unable to conclude that trial counsel's representation fell below an objective standard of reasonableness. Accordingly, the defendant's ineffective assistance claim fails under *Strickland's* first prong.

¶ 24 The defendant also suggests that his statements were involuntary because the police withheld medical attention. Again, we are unable to conclude that counsel's decision not to pursue suppression on this basis amounted to ineffective assistance. There is no indication the defendant requested medical help prior to or during his discussions with the police. As the defendant notes in his brief, the police were not aware of his BAC until 3:30 a.m. on June 8, 2005. By this time, however, the defendant had already been interviewed by Officer Pienta, gave two accounts of the incident, and made statements to police at his home. Further, as we have stated, there is no evidence that the defendant appeared ill or gravely debilitated during his statements to Officer Pienta. To the contrary, he volunteered detailed information about the shooting and appeared relaxed and lucid. Based upon these circumstances, his trial counsel

likely determined that a motion to suppress based upon an alleged withholding of medical care would have been unsuccessful, and that it was more beneficial to the defendant to allow his self-defense account to be presented at trial through his statement to the police. This determination amounted to trial strategy. Accordingly, trial counsel's decision not to seek suppression fails under *Strickland*. Based upon our conclusion, in this regard, we need not reach the defendant's contingent argument that appellate counsel was ineffective for not challenging trial counsel's forfeiture of the suppression issue under the plain error doctrine.

¶ 25 For the foregoing reasons, we affirm the circuit court's dismissal of the defendant's postconviction petition.

¶ 26 Affirmed.