

2015 IL App (2d) 131183-U  
No. 2-13-1183  
Order filed May 13, 2015

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE )  
OF ILLINOIS, ) Appeal from the Circuit Court  
) of Lake County.  
)  
Plaintiff-Appellee, )  
)  
v. ) No. 12-CF-0616  
)  
MACARIO SOTO, ) Honorable  
) George Bridges,  
Defendant-Appellant. ) Judge, Presiding.

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JUSTICE McLAREN delivered the judgment of the court.  
Justices Hudson and Birkett concurred in the judgment.

**ORDER**

*Held:* The trial court properly denied defendant’s motion for judgment notwithstanding the verdict or, in the alternative, for a new trial where the record shows that defendant’s claims of ineffective assistance of counsel are groundless and the trial court did not abuse its discretion in denying defendant’s request for a continuance.

¶ 1 Following a bench trial, defendant, Macario Soto, was convicted of one count of predatory criminal sexual assault (720 ILCS 5/12-14.1(a)(1)(West 2010)) and three counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2010)). Defendant appeals from the trial court’s verdict of guilt entered on August 13, 2012, and from the October 8, 2013,

denial of his motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. Defendant argues on appeal that his posttrial motion should have been granted due to the ineffective assistance of his counsel and a single instance of trial court error with respect to discovery. Because the record shows that defendant's claims are groundless, we affirm.

¶ 2

## I. BACKGROUND

¶ 3 Prior to trial, the trial court admonished defendant as follows regarding the consequences of a finding of guilt.

“THE COURT: And also, Mr. Soto, you understand that if you're not a citizen of the United States, that a finding of guilty even by a bench trial or a jury, that it could result in you being deported from the United States; do you understand that?

THE DEFENDANT: Yes.

THE COURT: Do you also understand that if you were to leave the United States, it could prevent you from being allowed to return to the United States. Do you understand that as well?

THE DEFENDANT: Yes.

THE COURT: And lastly, if you were to seek to become a naturalized citizen, it could prevent you from becoming a citizen of the United States as well. And do you understand that?

THE DEFENDANT: Yes.

THE COURT: And you have also discussed that matter or those facts with your attorney as well; is that correct?

THE DEFENDANT: Yes.”

¶ 4 On August 13, the day set for trial, defendant's attorney, Bradley F. Aubel, represented to the trial court that he had just learned from family members that the victim was seeing a psychologist and "made certain statements either exculpatory or inculpatory regarding [defendant]." Defense counsel asked to issue a subpoena for records. The State responded with a motion *in limine* to limit victim's cross-examination regarding seeing a psychologist. The trial court denied both the motion to issue subpoena and the motion to limit cross-examination.

¶ 5 The victim's mother, Carmen Soto, testifying through an interpreter, stated that defendant was her brother. Between January 2008 and December 2009, Soto, her children, her mother, defendant, and several of her other siblings lived together in Round Lake Park, Illinois. Soto worked at O'Hare airport five days a week while her mother watched her children. She stated variously that 15 or 18 people lived in the house.

¶ 6 The victim, J.V., was ten years old at the time of the trial. She testified that defendant was her uncle. She lived in a house with her mother, grandmother, aunt, cousins, and defendant. While her mother was at work, her grandmother watched her and her cousins. She stated that defendant abused her "many times." During the relevant time frame, no one else touched her inappropriately.

¶ 7 On cross-examination, J.V. stated that she had talked to a psychologist six times about these events and about dreams she had. J.V. also stated ten people lived in the house.

¶ 8 Detective Deiky Colon, with the Round Lake Park police department, testified that on February 28, 2012, he interviewed defendant in his investigations office at the police department for approximately 40 minutes. Another detective, Hector Lepe, was also present. Defendant was given Miranda warnings before making oral admissions of guilt and executing a handwritten statement in which he confessed to criminal sexual abuse of his niece.

¶ 9 After the State rested, defense counsel moved for a continuance to get records from J.V.'s therapy sessions and also moved to dismiss the case. The trial court denied the motion for a continuance but granted the motion to dismiss as to counts 2, 4, and 6.

¶ 10 Defendant testified on his own behalf. He denied having abused his niece, stating that he had executed the written confession before he was given Miranda warnings and then only because the detectives assured him he "could go home" if he wrote down what they told him to say.

¶ 11 On August 13, 2012, the trial court found defendant guilty. At sentencing on September 25, Mr. Aubel indicated he was not filing any posttrial motions, representing to the trial court that he did not believe there were any issues during the trial to be raised in a posttrial motion. Defendant asked whether he could hire a new attorney but agreed to being represented by Mr. Aubel through sentencing.

¶ 12 On September 25, the trial court sentenced defendant to concurrent terms of ten-years' imprisonment on count I for predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1)(West 2010)); five years' imprisonment on count III for aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2010)); and two terms of five years each on counts V and VII for aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2010)), to run concurrently with counts I and III and with each other.

¶ 13 On October 9, 2012, defendant wrote a letter to the trial court claiming that he was denied a fair trial due to the ineffective assistance of trial counsel, attorney Bradley Aubel. On October 25, defendant, through a new attorney, moved for a judgment notwithstanding the verdict or, in the alternative, for a new trial, based solely on the ineffectiveness of trial counsel. On March 21, 2013, defendant filed an amended motion for a judgment notwithstanding the verdict or, in the

alternative, for a new trial, adding a claim of trial court error in declining to continue the trial while defendant attempted to subpoena reports of the psychologist who spoke with J.V. On June 11, 2013, the trial court granted defendant leave to file a second amended petition, in which defendant added an argument that the United States Supreme Court's holding in *Padilla v. Kentucky*, 559 U.S. 356 (2010)—that defense counsel must advise a defendant of the immigration consequences of entering a guilty plea—should be extended to this case, where defendant did not plead guilty but, instead, proceeded to trial.

¶ 14 Also, on June 11, defendant's (and Carmen Soto's) sister, Yesenia, testified, as did defendant's father and brother, regarding attorney Aubel's failure to investigate the possibility that defendant's sister Carmen (J.V.'s mother) may have framed defendant and that Carmen's boyfriend may have committed the abuse for which defendant was charged. Defendant also testified on June 11, stating that Mr. Aubel had filed no motions on his behalf and had lied to him by telling him that a jury would find him guilty. Defendant acknowledged that the court had explained the difference between a bench trial and jury trial and that he had discussed waiving his right to a jury trial with his attorney. He also acknowledged that the court had advised him about the possible immigration consequences if he were to be found guilty, although he did not recall whether the judge had asked him whether he had discussed the immigration consequences with Mr. Aubel.

¶ 15 Defendant further testified that, prior to sentencing, he had discussed Mr. Aubel's recent federal indictment with Mr. Aubel and that, on the day of sentencing, he told the judge that he wished to continue to be represented by Mr. Aubel through sentencing because he had "already paid him."

¶ 16 The record on appeal does not include any reports of proceedings for any hearings subsequent to June 11.<sup>1</sup> The common law record contains five continuance notations, with the hearing and closing arguments on defendant's posttrial motion occurring on September 25, 2013.

¶ 17 On October 8, 2013, the trial court denied defendant's posttrial motion. Notice of appeal was filed on November 6, appealing from the August 13, 2012, trial verdict and the October 8, 2013, denial of defendant's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial.

¶ 18 On January 3, 2013, Attorney Aubel was suspended from the practice of law by the Illinois Attorney Registration and Discipline Commission due to his prior federal indictment in August 2012 for wire fraud, mail fraud, and obstruction of justice.

¶ 19

## II. ANALYSIS

¶ 20

### A. Ineffective Assistance of Counsel

¶ 21 Defendant argues that the cumulative effect of defense counsel's lack of investigation and failure to file any pretrial motions deprived defendant of his right to the effective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). Defendant asserts that his attorney never interviewed witnesses, did not file an answer, did not file a motion to suppress defendant's confession, did not file a motion to preserve any video or audio recordings of the Round Lake Park police department's interview, did not issue any subpoenas, and did not hire an investigator.

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<sup>1</sup> On June 27, 2014, we granted the State's motion to compel defendant to produce the complete record on appeal and directed defendant to produce, at his expense, the reports of proceedings "starting with July 15, 2013, and ending with October 8, 2013." No such reports of proceedings appear in the record before us.

¶ 22 Under the sixth and fourteenth amendments to the United States Constitution and article I, section 8 of the Illinois Constitution, a defendant in any criminal case has a right to effective assistance of counsel. *Strickland* 466 U.S. at 685. Under the test articulated in *Strickland*, a defendant must demonstrate facts which, if true, would demonstrate that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced the defendant. *Id.* at 687, 692. Because a defendant must satisfy both prongs of the *Strickland* test, the failure to prove either prong precludes a finding of ineffective assistance. *People v. Theis*, 2011 IL App (2d) 091080, ¶ 39.

¶ 23 Our review of defendant's ineffective-assistance claims is bifurcated: we defer to the trial court's findings of fact unless they are contrary to the manifest weight of the evidence, but we assess *de novo* the ultimate legal issue of whether counsel's act or omission supports an ineffective-assistance claim. *Id.* at ¶ 24. A defendant may raise an ineffective-assistance claim on direct appeal when the basis of the claim can be ascertained from the record. *People v. Watson*, 2012 IL App (2d) 091328, ¶ 21.

¶ 24 The State initially contends that defendant has forfeited two of the claims of ineffective assistance he raises on appeal, namely, that attorney Aubel failed to file motions to suppress statements or to preserve video or audio recordings of defendant's statement. We agree that both claims are forfeited.

¶ 25 Separate counsel, who began representing defendant following sentencing and who filed the second-amended motion for judgment notwithstanding the verdict or, in the alternative, for a new trial on behalf of defendant, failed to preserve defendant's claim that trial counsel's failure to file a motion to suppress constituted ineffective assistance of counsel. The posttrial motion stated only that "Aubel did not file a motion to suppress hearing" and contained no argument that

not filing a motion to suppress constituted ineffective assistance of counsel. Nor was the issue raised at the hearing on the posttrial motion. Defendant's motion-to-suppress claim is, therefore, forfeited. See *People v. Allen*, 409 Ill. App. 3d 1058, 1076-77 (2011) (where *pro se* defendant who was represented by posttrial counsel failed to bring claims of ineffectiveness to the trial court's attention, those claims were forfeited on appeal).

¶ 26 We note that, at trial, defendant was subjected to extensive cross-examination on the issue of possible coercion of his confession, and Detective Colon, who took defendant's oral and written confessions, was also examined and cross-examined on the issue of coercion. The trial court found defendant to be self-contradictory and "not credible," while finding Detective Colon to be credible. The court also found credible the testimony of J.V. that defendant had abused her. We cannot say these findings are against the manifest weight of the evidence. However, we reach no conclusion on the separate legal issue of whether counsel's act or omission supports an ineffective-assistance claim, since that question was not presented to the trial court and is not now before us.

¶ 27 Defendant has similarly forfeited his claim of ineffective assistance of counsel with respect to Mr. Aubrey's failure to file a motion to preserve video or audio recordings of his statement. This claim was not raised in the posttrial motion nor mentioned at the hearing on the posttrial motion. Therefore, we will not consider it. *Allen*, 409 Ill. App. 3d at 1076-77. In passing on this claim, we note the testimony of Detective Colon that, tape and video recording equipment, although available at the station, was used only in homicide cases and was not used in this case. Defendant, on the other hand, presented no evidence to indicate the existence of any video or audio recordings of his statement. Defendant's claim of ineffective assistance for failure to preserve recording evidence might best be categorized as a counterfactual conditional.



In any event, we do not reach the merits of this ineffective-assistance claim, as no such claim was presented to the trial court.

¶ 28 We reject the remainder of defendant's ineffective-assistance claims on direct appeal because the record shows they are groundless. *People v. Watson*, 2012 IL App (2d) 091328, ¶ 21. Defendant asserts that Mr. Aubrey was ineffective for failing to interview witnesses and failing to hire an investigator. Defendant does not direct us to any support for this assertion in the record. Although the record shows that certain witnesses who were called at the hearing on the posttrial motion had not been contacted by Mr. Aubrey, it does not follow from this testimony that no investigation was conducted, whether by Mr. Aubrey, a hired investigator, or another individual.

¶ 29 Defendant also contends that he was prejudiced by Mr. Aubrey's failure to file an answer in this case because he was unable to call witnesses to impeach J.V.'s testimony regarding her abuse by defendant. We disagree. The record shows that when defendant called an undisclosed witness to impeach J.V.'s testimony, the court heard an offer of proof as to the relevancy of the proposed testimony before ultimately granting the State's motion to exclude the witness. There is no evidence of record showing that witnesses were barred due to the failure to file an answer.

¶ 30 Defendant further contends that had Aibel called the witnesses who were heard in the posttrial hearing, their testimony would have left the trier of fact with a reasonable doubt of defendant's guilt. Defendant ignores the fact that this was a bench trial and the trier of fact had the opportunity to weigh these witnesses' evidence. Moreover, the trial court produced a record that demonstrates the meritless nature of defendant's claims. *People v. Moore*, 207 Ill. 2d 68, 80 (2003). It is clear from the transcript of the posttrial hearing that each of defendant's witnesses was effectively cross-examined as to the relevance of his or her testimony. Although defendant

has not provided us with the transcript of the proceeding in which the court decided the posttrial motion, it is apparent from the judge's ruling that he was not persuaded by defendant's witnesses to change his findings as to J.V.'s credibility and defendant's admission to the wrongful acts. Defendant does not argue that the trial court's credibility determinations were against the manifest weight of the evidence. Thus, on the record before us, defendant has not established a reasonable probability that, but for his attorney's failure to call these witnesses at trial, "the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

¶ 31 Finally, defendant argues that he received ineffective assistance of counsel because his attorney failed to discuss the immigration consequences of a conviction with him before the trial. The record contradicts this contention. In addition to admonishments about defendant's right to a jury trial, the trial court admonished defendant that a finding of guilty by either a bench trial or a jury trial could result in deportation from the United States, prevent reentry into the United States, or prevent him from seeking U.S. citizenship. The trial court also specifically inquired as to whether these matters had been discussed with his attorney, and defendant answered that they had. The record indicates that defendant was admonished clearly and with a translator, both by the trial court and by his attorney.

¶ 32 We decline defendant's invitation to extend the ruling of *Padilla v. Kentucky*, 559 U.S. 356 (2010), a guilty plea case, to the present circumstances, where defendant proceeded to trial. *Padilla* held that defense counsel engaged in deficient performance, as required to establish ineffective assistance, by failing to advise the defendant that his plea of guilty to drug distribution made him subject to automatic deportation. Defendant acknowledges the limitation of the holding but cites *People v. Hughes*, 2012 IL 112817, an Illinois Supreme Court case that

discusses *Padilla* and remarks on the plea bargain process and “potential problems inherent in a rigid categorical system of distinguishing between direct and collateral consequences” of a guilty plea. *Id.* at ¶ 47. *Hughes* noted that the U.S. Supreme Court recognized deportation as a civil consequence of a guilty plea despite the difficulty of classifying deportation as either a direct or collateral consequence of a guilty plea. *Id.* at ¶ 49. Following *Padilla*’s example, the Illinois Supreme Court concluded that “defense counsel has a minimal duty to advise a defendant who pleads guilty to a triggering offense subject to the provision of the Sexually Violent Persons Commitment Act that he will be evaluated for and may risk involuntary commitment after completing his prison term.” *Id.* at ¶ 60.

¶ 33 Neither *Hughes* nor *Padilla* contemplates imposing a duty to advise of specific consequences where, as here, a defendant does not enter a guilty plea but elects to proceed to trial. Even were we to consider extending the holdings of *Padilla* and *Hughes*, we certainly would not do so in this case, where defendant was in fact advised by both his attorney and the court of the immigration consequences of a guilty verdict before proceeding to trial. We choose not to impose a duty on counsel to advise a defendant of the consequences of a nonexistent plea.

¶ 34 Because defendant has established neither deficiency of performance nor prejudice with respect to any of the ineffective-assistance claims before us, he has not demonstrated that his attorney rendered ineffective assistance of counsel under the standards set forth in *Strickland*. *Strickland*, 466 U.S. at 687, 692.

¶ 35 B. Denial of Defense Motion for Continuance

¶ 36 Defendant argues that the trial court abused its discretion when it denied his motion for a continuance in order to subpoena records from the victim’s therapy sessions to determine

whether her statements were memorialized, and if they were, whether they contained any exculpatory information. Defendant's argument lacks coherence and factual support.

¶ 37 . The record reveals that on the morning of trial, defendant's attorney represented to the trial court that he had just learned from family members that the victim was seeing a psychologist and "made certain statements either exculpatory or inculpatory regarding [defendant]." At that time, defense counsel asked to issue a subpoena for records. The State responded with a motion *in limine* to limit victim's cross-examination regarding seeing a psychologist. The trial court denied both the subpoena request and the motion to limit cross-examination.

¶ 38 After the State rested, defendant moved for a continuance in order to subpoena the records. The trial court denied the continuance motion, stating, "I will not continue this trial for you to try and get records to determine whether or not [J.V.] may have said something that contradicts her testimony before this court." The court noted that the identity of J.V.'s therapist was unknown, and there was no evidence that records from J.V.'s therapy sessions even existed, much less contained anything exculpatory or contradictory. We cannot say the court abused its discretion in denying the motion for a continuance. See *People v. Abernathy*, 399 Ill.App.3d 420, 441 (2010) (the grant or denial of a continuance motion is within the sound discretion of the trial court, and its ruling will not be disturbed unless that decision amounts to an abuse of discretion).

¶ 39 On appeal, defendant asserts for the first time that a continuance was necessary to obtain relevant information that should have been disclosed by the State. Defendant has forfeited this contention. See *People v. Mitchell*, 355 Ill. App. 3d 1030, 1033 (2005) (argument raised for the first time on appeal is forfeited). Forfeiture aside, defendant advances no evidence that the State

possessed or controlled information regarding counseling records. The assistant State's Attorney told the court he first heard about counseling reports when defendant mentioned them on the morning of trial. Defense counsel stated that he believed the State was unaware of any recorded statements by the victim to a therapist. There is no ground in the record for defendant's argument on appeal that a discovery violation occurred that warranted the allowance of a continuance as a sanction.

¶ 40

### III. CONCLUSION

¶ 41 For the reasons stated, we affirm

¶ 42 Affirmed.