2015 IL App (3d) 130136-U

Order filed January 7, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit,
	)	Rock Island County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-13-0136
v.	)	Circuit No. 08-CF-385
	)	
ERIC HENRY,	)	The Honorable
	)	Charles H. Stengel,
Defendant-Appellant.	)	Judge, Presiding.
	)	

PRESIDING JUSTICE McDADE delivered the judgment of the court.
Justice O'Brien concurred in the judgment.
Justice Carter specially concurred.

ORDER

¶ 1 *Held*: Defendant's post conviction petition was properly dismissed at the first stage.

¶ 2 Defendant, Eric Henry, filed a *pro se* petition for post conviction relief in which he claims that both his trial counsel and appellate counsel were ineffective. The petition was summarily dismissed, and defendant appeals. We affirm.

¶ 3 FACTS

¶ 4 The background facts of this case have been set out in a previous order issued by this court in *People v. Henry,* 2011 IL App (3d) 100106-U. Accordingly, we will set forth only those facts necessary for the disposition of this particular appeal.

¶ 5 Defendant was found guilty of the murder of Katherine Pedigo. His conviction and sentence were affirmed on direct appeal. *People v. Henry*, 2011 IL App (3d) 100106-U. Defendant's co-defendant, Gustavo Dominguez, was found not guilty by reason of insanity in a separate bench trial.

¶ 6 During defendant's jury trial, the State presented a theory that defendant had access/keys to Pedigo's apartment because he performed work on the apartment prior to Pedigo moving in. Alternatively, defendant presented a theory that Dominguez was the sole person responsible for Pedigo's murder. Defendant's involvement in the crime was, at most, he received property that Dominguez took from Pedigo's apartment. To support this theory, defense counsel filed a "Motion to Allow Witness Testimony" that included a request that evidence be admitted of Dominguez's "other-crimes" that took place after the alleged murder of Pedigo. Counsel made the following offer of proof.

¶ 7 Five months after Pedigo's murder, Rose Guyton was alone in her home when she heard someone pounding and rattling her door trying to gain entry. This person remained on her front porch. Guyton called 911. When officers arrived at the scene they arrested Dominguez. At the time, Dominguez possessed binoculars and was wearing female underwear underneath his male underwear. Counsel asserted that Dominguez was attempting to gain entry into Guyton's home.

¶ 8 Dominguez pled guilty to disorderly conduct. Counsel argued that the "other-crimes" evidence was relevant to show Dominguez's *modus operandi*; and it rebutted the State's claim that he and defendant murdered Pedigo together.

¶ 9 The circuit court found the "other-crimes" evidence inadmissible because there was a "huge range" between Pedigo's murder and Dominguez's subsequent disorderly conduct. The court also held that the evidence was "too speculative and remote" and would likely "be misused or overestimated by the jury." Counsel included the issue in her motion for new trial, but appellate counsel did not raise the issue on direct appeal.[1]

¶ 10 Defendant filed a *pro se* post conviction petition arguing, in part, that trial counsel was ineffective for failing to request a fitness hearing. Defendant also alleged that appellate counsel was ineffective for failing to argue on direct appeal that the circuit court erred when it denied admission of evidence concerning Dominguez's subsequent disorderly conduct conviction.[2] The circuit court summarily dismissed defendant's petition. Defendant appeals.

¶ 11 ANALYSIS

¶ 12 Defendant argues that trial counsel was ineffective for failing to request a fitness hearing. This claim could have been raised in the direct appeal following the trial, and the failure to raise it constitutes waiver of the claim for post conviction purposes.[3] *People v. Erickson,* 161 Ill. 2d 82, 87 (1994).

¶ 13 Defendant also argues that appellate counsel was ineffective in failing to challenge the circuit court's decision barring defendant from presenting "other-crimes" evidence that

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[1] The sole issue raised on direct appeal was that the prosecutor's remarks during closing argument entitled defendant to a new trial.

[2] The petition also contained other allegations, however, defendant does not raise them in the present appeal.

[3] We note defendant's mental history was part of the record in the direct appeal following the trial (presentence report).

Dominguez engaged in after the murder of Pedigo. Because the instant case involves a first stage dismissal, defendant's petition is only required to present the gist of a claim for ineffective assistance of appellate counsel. *People v. Harris*, 224 Ill. 2d 115, 126 (2007). Our review of the circuit court's dismissal is *de novo*. *People v. Lander*, 215 Ill. 2d 577, 583 (2005).

¶ 14 Claims of ineffective assistance of appellate counsel are evaluated under the *Strickland* standard (*Stickland v. Washington*, 466 U.S. 668 (1984)), which requires the defendant to show both deficient performance by counsel and resultant prejudice. *People v. Pecoraro*, 175 Ill. 2d 294, 333 (1997). As applied to claims involving failure of appellate counsel to raise a particular issue, the defendant must show that the failure to raise the issue was objectively unreasonable and that, but for this failure, a reasonable probability exists that the sentence or conviction would have been reversed. *People v. Mack*, 167 Ill. 2d 525, 532 (1995).

¶ 15 We begin with the first *Strickland* prong: whether appellate counsel's failure to raise the "other-crimes" issue was objectively unreasonable. Appellate counsel's decision not to raise an issue cannot be deemed unreasonable if said issue is meritless. *People v. Easley*, 192 Ill. 2d 307, 329 (2000). As shown below, defendant's "other-crimes" issue lacks merit and appellate counsel's decision not to raise this issue does not constitute the gist of a constitutional claim.

¶ 16 With regard to the admissibility of "other-crimes" evidence, the supreme court (*People v. Cruz*, 162 Ill. 2d 314, 349 (1994)) has stated:

> "Where other-crimes evidence is offered, it is admissible only where the other crime bears some threshold similarity to the crime charged. [Citations.] This threshold requirement serves to increase the relevancy of the evidence and ensures that the evidence is not being used solely to establish a defendant's

> criminal propensities. [Citation.] In cases where evidence of other crimes is offered, however, to establish *modus operandi* or a common design or plan, a 'high degree of identity' between the facts of the crime charged and the other offense has been required. [Citations.] This high degree of identity between the other offense and the charged crime is necessary because *modus operandi* refers to a pattern of criminal behavior so distinctive that separate crimes are recognized as the handiwork of the same wrongdoer. [Citation.] This court has also recognized that even where such evidence is offered to prove *modus operandi*' some dissimilarity will always exist between independent crimes.' [Citation.]

Illinois courts have further defined *modus operandi* as follows:

> " '*Modus operandi* refers to a pattern of criminal behavior so distinct that separate crimes are recognized as the work of the same person. If evidence of other crimes is offered to prove *modus operandi*, there must be some clear connection between the other crime and the crime charged which creates a logical inference that if the defendant committed those acts, he may have committed the act at issue. The inference is created when both crimes share peculiar and distinctive common features so as to earmark both crimes as the handiwork of the defendant. [Citation.].' " *People v. Denny*, 241 Ill. App. 3d 345, 358 (1993) quoting *People v. Rose*, 198 Ill. App. 3d 1, 6-7 (1990).

¶ 17 The "other-crimes" evidence in the instant case does not have a "high degree of identity" or a "clear connection" to the underlying crime -- Pedigo's murder. We reject defendant's faulty premise that since there was no evidence of forced entry into Pedigo's apartment; evidence that Dominguez jiggled door knobs at a woman's dwelling five months later establishes it was Dominguez and not defendant that killed Pedigo.

¶ 18 The State's theory in the instant case was that both Dominguez and defendant gained access to Pedigo's apartment and repeatedly stabbed her knowing said acts would cause her death. To explain the lack of forced entry, the State presented the theory that defendant had access/keys to Pedigo's apartment. Dominguez's jiggling of door knobs five months later does not create a logical inference that both crimes were committed by Dominguez alone. We agree with the circuit court's decision barring the evidence on the grounds that it was "too speculative and remote." Defendant's petition fails to state the gist of a constitutional claim.

¶ 19 Accordingly, we affirm the circuit court's judgment.

¶ 20 Affirmed.

¶ 21 JUSTICE CARTER, specially concurring.

¶ 22 I concur with the majority's discussion and respectfully write separately to note the following considerations.

¶ 23 The relevant-evidence issue presented to this court provides an example of the interplay between Illinois Rules of Evidence 402, 403, and 404 (eff. Jan. 1, 2011). Although a defendant can show that the crime for which he is charged was committed by another person as relevant evidence (*People v. Beaman*, 229 Ill. 2d 56, 80 (2008)), that evidence can be rejected if it is remote, uncertain, or speculative (*People v. Wheeler*, 226 Ill. 2d 92, 132 (2007); Ill. R. Evid. 402, 403, 404(b) (eff. Jan. 1, 2011); Michael H. Graham, Graham's Handbook of Illinois Evidence

§ 403.2 (10th ed. 2010)). In addition, other-crimes evidence that is used to show that another person has committed a crime of a similar nature is admissible only if there is a strong and persuasive showing of similarity between the evidence and the crime for which the accused is being tried at present. Ill. R. Evid. 404(b) (eff. Jan. 1, 2011); *Cruz*, 162 Ill. 2d at 349; *People v. Tate*, 87 Ill. 2d 134, 141 (1981); Michael H. Graham, Graham's Handbook of Illinois Evidence § 404.5 (10th ed. 2010). In this case, as noted in the majority opinion, the requirement of similarity as a prerequisite of admissibility was not present. There simply was not a persuasive showing of similarity between Dominguez's actions months later to create an inference that Dominguez committed both crimes alone. See Michael H. Graham, Graham's Handbook of Illinois Evidence § 404.5 (10th ed. 2010).