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2015 IL App (3d) 130393-U

Order filed June 18, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF)	Appeal from the Circuit Court
ILLINOIS,)	of the 12th Judicial Circuit,
)	Will County, Illinois,
Plaintiff-Appellee,)	
)	Appeal No. 3-13-0393
v.)	Circuit No. 03-CF-825
)	
TIMOTHY EVANS,)	Honorable
)	Sarah F. Jones,
Defendant-Appellant.)	Judge, Presiding.

PRESIDING JUSTICE McDADE delivered the judgment of the court.
Justices O'Brien and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court erred by dismissing defendant's petition for postconviction relief at the second stage, where the petition made a substantial showing that guilty plea counsel provided ineffective assistance.

¶ 2 Defendant, Timothy Evans, appeals from the circuit court's second-stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). On appeal, defendant asserts that the court erred because defendant's petition made a

substantial showing that defendant was denied his right to effective assistance of counsel. We reverse and remand for third-stage postconviction proceedings.

¶ 3

FACTS

¶ 4

Defendant was charged with a total of 16 counts, including home invasion (720 ILCS 5/12-11(a)(6) (West 2002)), residential burglary (720 ILCS 5/19-3(a) (West 2002)), aggravated criminal sexual abuse (720 ILCS 5/12-16(a)(6) (West 2002)), and predatory criminal sexual assault of a child (720 ICLS 5/12-14.1(a)(1) (West 2002)). The charges resulted from the defendant's alleged entry into 10 different Will County residences in 2002 and 2003. Defendant pled guilty to 13 counts as part of an agreement that was open as to sentencing. In exchange, the State dismissed two residential burglary counts and a home invasion count. The trial court accepted the plea agreement and sentenced defendant to an aggregate of 50 years' imprisonment. Defendant's motion to reconsider the sentence was denied. On direct appeal, this court affirmed the sentence. *People v. Evans*, 3-06-0222 (2007) (unpublished order under Supreme Court Rule 23).

¶ 5

Defendant filed a petition under the Act (725 ILCS 5/122-1 *et seq.* (West 2008)), alleging that his guilty plea counsel was ineffective. The court advanced the petition to the second stage and appointed counsel. Counsel filed two amended petitions, the latter of which argued that plea counsel was ineffective for failing to advise defendant that the information disclosed during discovery indicated that the State lacked the evidence necessary to convict defendant of some of the charged offenses. The petition concluded that, had counsel properly advised defendant about the weaknesses in the State's case, defendant would not have pled guilty and would have proceeded to trial.

¶ 6 The State filed a motion to dismiss the petition. The court granted the motion to dismiss, finding that defendant was properly admonished before pleading guilty and that his plea waived the claims raised in his petition.

¶ 7 ANALYSIS

¶ 8 On appeal, defendant argues that the circuit court erred in dismissing his petition because the petition made a substantial showing of ineffective assistance of counsel. Specifically, defendant argues that the petition alleged that guilty plea counsel was ineffective for failing to advise defendant that the evidence disclosed during discovery was insufficient to convict him of at least two of the charged offenses (counts X and XV). Thus, defendant contends that, had counsel properly advised him, defendant would not have pled guilty and would have proceeded to trial.

¶ 9 The Act establishes a three-stage procedure for determining whether a defendant's convictions were tainted by a constitutional violation. 725 ILCS 5/122-1, *et seq.* (West 2008). At the second stage, the petitioner has the burden to make a substantial showing of a constitutional violation. *People v. Miller*, 203 Ill. 2d 433, 437 (2002). If the petition makes a substantial showing, the court shall advance the petition to the third stage and conduct an evidentiary hearing. 725 ILCS 5/122-6 (West 2008).

¶ 10 A claim of ineffective assistance of counsel is subject to the dual requirements set out in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a defendant must show that counsel was deficient and that the defendant was prejudiced as a result of that deficient performance. That is, the defendant must establish that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) but for counsel's deficient performance, there is a reasonable probability that the result of the proceedings would have been different. *Id.*

¶ 11 Counsel has a duty to keep a criminal defendant informed of developments in his case and to consult with the defendant on all major decisions. *People v. Smith*, 268 Ill. App. 3d 574, 579 (1994). Although counsel has the authority to make many decisions as a matter of trial strategy, one decision that belongs to defendant, and not to defense counsel, is the decision whether to plead guilty. *People v. Medina*, 221 Ill. 2d 394, 403 (2006). It is counsel's duty to aid a defendant in making an informed choice whether to plead guilty, and counsel's failure to advise a defendant of an available defense can constitute a violation of that duty. *People v. Mendez*, 336 Ill. App. 3d 935, 939 (2003). In the present case, defendant argues that his decision to plead guilty resulted from ineffective assistance because counsel failed to properly advise him of a meritorious defense: that the State's evidence was insufficient to prove him guilty beyond a reasonable doubt.

¶ 12 Specifically, defendant focuses on counts X and XV in support of his argument that counsel was ineffective for failing to advise him that the evidence disclosed during discovery was insufficient to prove defendant guilty. Counts X and XV both alleged that defendant committed a residential burglary (720 ILCS 5/19-3(a) (West 2002)), by entering the dwelling of another with the intent to commit a criminal sexual assault (720 ILCS 5/12-13 (West 2002)) therein.

¶ 13 The offense of criminal sexual assault requires an act of "sexual penetration," defined as "any contact, however slight, between the sex organ or anus of one person by an object, the sex organ, mouth or anus of another person, or any intrusion, however slight, of any part of the body of one person or of any animal or object into the sex organ or anus of another person, including, but not limited to, cunnilingus, fellatio, or anal penetration." 720 ILCS 5/12-12(f) (West 2002).

Defendant argues that the evidence disclosed during discovery was insufficient to establish defendant's intent to commit an act of sexual penetration.

¶ 14 The factual basis for count X alleged that defendant entered the home of M.B. and stood by her bed masturbating while M.B. was sleeping. The factual basis further alleged that defendant admitted to police that he entered M.B.'s dwelling with the intent to fulfill his sexual desires. During discovery, the State disclosed the police report relating to this offense. The police report stated that M.B. awoke to defendant standing in her bedroom with his pants down, masturbating. When M.B. awoke, defendant asked whether he could perform oral sex on her. M.B. yelled for defendant to leave, which he did.

¶ 15 The factual basis for count XV alleged that defendant entered the dwelling of M.H. and masturbated in her presence. The factual basis additionally alleged that defendant admitted to police that he entered the dwelling with the intent to fulfill his sexual desires. The police report associated with count XV stated that M.H. awoke to defendant entering her bedroom through a window. M.H. left her room to get her mother and when they returned, they observed defendant masturbating. M.H.'s mother screamed, and defendant fled the residence.

¶ 16 At the second stage of postconviction proceedings, we must take as true those factual allegations of defendant that are not positively rebutted by the record. *People v. Childress*, 191 Ill. 2d 168, 174 (2000). Therefore, we take as true defendant's assertion that counsel did not advise defendant that in order to prove him guilty of counts X and XV, the State was required to establish that defendant intended to commit an act of sexual penetration. Taking that allegation as true, we analyze whether defendant's petition made a substantial showing of ineffective assistance of counsel.

¶ 17 As to the first prong of the ineffective assistance standard, we find defendant made a substantial showing that counsel was deficient for failing to inform defendant that he had a meritorious defense to counts X and XV. In order to prove defendant guilty of counts X and XV, the State would have been required to prove that defendant entered or remained in the dwellings of M.B. and M.H. with the intent to commit an act of sexual penetration. However, neither the factual bases, nor the police reports, establish that defendant engaged in—or intended to engage in—any contact with the alleged victims. Rather, the evidence suggests that defendant entered the dwelling with the intent to masturbate, which is not an act of sexual penetration. See 720 ILCS 5/12-12(f) (West 2002). Although intent may be inferred from the surrounding circumstances and may be proved by circumstantial evidence, *People v. Maggette*, 195 Ill. 2d 336, 354 (2001), the circumstances in the present case did not suggest that defendant entered with the intent to commit an act of sexual penetration.

¶ 18 Defendant's petition also made a substantial showing that he suffered prejudice as a result of counsel's deficient performance. In the context of a guilty plea, a defendant must show that, had counsel not erred, there is a reasonable probability that the defendant would have gone to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). An allegation of prejudice must be accompanied by a claim of actual innocence or the articulation of a plausible defense that could have been raised at trial. *People v. Hall*, 217 Ill. 2d 324, 335-36 (2005). Here, defendant has established prejudice by raising a plausible defense: that the State's evidence would have been insufficient to prove him guilty beyond a reasonable doubt. Specifically, the State would not have been able to attain convictions on counts X and XV absent a showing that defendant intended to commit an act of sexual penetration. The allegation that defendant was not informed of this fact acts to impugn the entire viability of defendant's plea.

¶ 19 The State argues—and the trial court below found—that defendant waived his claim by pleading guilty. The State is correct that a guilty plea generally waives all nonjurisdictional defects related to the plea. *People v. Horton*, 143 Ill. 2d 11, 22 (1991). However, a guilty plea is involuntary if entered without the effective assistance of counsel. *Mendez*, 336 Ill. App. 3d at 939. A claim that a guilty plea was involuntary is not waived by pleading guilty. *Id.* Thus, defendant's claim of ineffective assistance of counsel was not waived, as it affected the voluntariness of defendant's plea.

¶ 20 Nor did defendant forfeit his claim by failing to raise it on direct appeal. The forfeiture doctrine bars claims that could have been raised on direct appeal but were not. *People v. Blair*, 215 Ill. 2d 427, 443-44 (2005). However, that prohibition does not apply where "the claim's evidentiary basis was *de hors* the record." *People v. Whitehead*, 169 Ill. 2d 355, 372 (1996), *overruled on other grounds by People v. Coleman*, 183 Ill. 2d 366, 382-83 (1998). Here, defendant's claim relies in part on the police reports disclosed during discovery, which were not part of the trial record. More importantly, however, is the fact that the contents of what plea counsel did, or did not, tell defendant prior to pleading guilty are not contained within the record. In light of these particular circumstances, forfeiture does not bar defendant from raising this claim for the first time in a postconviction petition.

¶ 21 CONCLUSION

¶ 22 The judgment of the circuit court of Will County is reversed, and the cause is remanded for third stage postconviction proceedings.

¶ 23 Reversed and remanded.