2015 IL App (3d) 130711-U

Order filed November 10, 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 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-13-0711 Circuit No. 08-CF-1330
SCOTT A. ROSSOW,	)	
Defendant-Appellant.	)	Honorable Daniel J. Rozak, Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justice Schmidt concurred in the judgment.
Justice Carter specially concurred.

ORDER

¶ 1 *Held*: The trial court did not err by summarily dismissing defendant's postconviction petition alleging counsel was ineffective, but erroneously entered four convictions at the time of trial in violation of the one-act, one-crime rule.

¶ 2 The State charged defendant Scott Rossow with four counts of aggravated driving under the influence of alcohol (DUI) alleging defendant drove a vehicle, while under the influence of alcohol or with a blood alcohol content (BAC) of .08% or more, resulting in the deaths of the

two other occupants in the vehicle after it was involved in a crash. After a bench trial, the court found defendant guilty of all four counts and sentenced defendant to concurrent sentences of 13 years' imprisonment for each of the four counts. Defendant filed a direct appeal and this court affirmed defendant's convictions.

¶ 3 Defendant filed a petition for postconviction relief (postconviction petition) raising five constitutional issues. The court summarily dismissed the postconviction petition finding the allegations in the postconviction petition were "frivolous, patently without merit, and fail[ed] to raise a sufficient constitutional question upon which relief could be granted." Defendant filed a timely notice of appeal challenging the summary dismissal of his postconviction petition. We affirm, but order the mittimus be modified to reflect two convictions, one for each victim, rather than four convictions.

¶ 4 BACKGROUND

¶ 5 David Sauseda, Christopher Sommers, and defendant were occupants in a Corvette vehicle, owned by Sauseda, that was involved in a single car crash on December 8, 2006. As a result of the crash, Sauseda and Sommers died at the scene. Defendant was seriously injured and transported to the hospital.

¶ 6 Subsequently, on May 21, 2008, the State charged defendant with four felony counts of aggravated DUI (625 ILCS 5/11-501(a)(1), (2) (West 2008)). Two of the counts alleged defendant drove under the influence of alcohol or with a BAC of .08% or greater when he crashed the vehicle resulting in Sauseda's death (counts I and II respectively). The other two counts alleged both versions of DUI resulting in the death of Sommers (counts III and IV). The court held a bench trial on all four counts.

¶ 7 The following evidence was presented during the bench trial that began on November 10, 2010. Mokena police officer Kimberly Exton testified that she came upon the crash site around 4:21 a.m. when she noticed a vehicle wrapped around a tree. Officer Exton discovered Sommers' body, with no pulse, at the northwest rear of the vehicle. She next found Sauseda's body, with no pulse, beside defendant's body on the other side of a clump of trees to the southeast of the vehicle. Sauseda was missing the lower part of his legs, which were located in the front passenger area of the Corvette, along with his pants and shoes.

¶ 8 Defendant was alive at the scene, but severely injured. The parties stipulated to evidence showing defendant's alcohol serum rate was .15 when he was treated for his injuries at the hospital, which converted to 0.127% BAC.

¶ 9 Dr. Scott Denton, the forensic pathologist conducting the autopsies, testified that Sommers died instantaneously from multiple injuries received during the crash. Sommers had no alcohol in his system. Sauseda died instantaneously from multiple injuries to the neck and pelvis, and the amputation of his lower legs due to a motor vehicle crash. Sauseda had a BAC of 0.193%.

¶ 10 Deputy Steven Kirsch testified he was employed by the Will County Sheriff's Department and was certified as an accident reconstructionist. Deputy Kirsch took measurements at the scene and recovered and obtained a printout from the vehicle's crash data recorder. Deputy Kirsch found tire marks indicating the vehicle was in a counterclockwise yaw before it left the road. The vehicle hit a tree 44 feet from the roadway, which intruded into the passenger area approximately three feet. The vehicle's crash data recorder documented the vehicle's speed at intervals between 99 mph and 103 mph just prior to the crash.

¶ 11 The State called Michael DiTallo, a certified accident reconstruction expert, who testified he reviewed the State's evidence, police photographs and diagrams, medical records, and the vehicle's crash data recorder printout. He also visited the accident site in 2008 and inspected the Corvette, which had two seats and a small hatchback area behind the seats. DiTallo's reconstruction analysis indicated that the Corvette began to yaw counterclockwise, left the road, and struck a tree immediately behind its right front wheel. The impact forced the seats to shift toward the passenger door causing the passenger door to pop off the vehicle. In DiTallo's opinion, the force of the impact caused both front seat occupants to be thrown through the passenger door opening.

¶ 12 DiTallo concluded Sommers was seated in the rear hatchback area. These conclusions were based on the nature of Sommers' injuries, the presence of glass on his body, his location at the scene, and the direction his body would have traveled as a result of the point of impact.

¶ 13 DiTallo opined Sauseda was seated in the right passenger area of the vehicle at the time of the crash. This opinion was based on Sauseda's injuries, including the evidence of his severed legs in the vehicle and the location of his body at the scene.

¶ 14 Finally, DiTallo determined that defendant was seated at the driver's wheel when the crash occurred. This conclusion was based on the process of elimination of the other two occupants, the location of his body next to Sauseda, and the fact that the driver's seat was further away from the impact, which resulted in fewer injuries to defendant. DiTallo determined, based on the crash, the person in the hatch area would have ended up resting in a different location than the two front seat occupants.

¶ 15 The State's witness, Elizabeth Marco, Sommers' former girlfriend, testified that she picked Sommers up at Chicago O'Hare International Airport around 11:00 p.m. on December 7,

2006, after he attended a training seminar in South Carolina. Marco said she drove Sommers to his apartment where Sommers packed a duffel bag with clothing for a snowmobiling trip he was taking the next day. While at the apartment, Sommers received a telephone call from defendant and then asked Marco to drop him off at the 115 Bourbon Street Bar. Marco and Sommers arrived at the bar around 2:30 a.m. where they met with defendant. Defendant placed Sommers' bag in the Corvette. Marco overheard Sommers ask defendant how he would get home since the Corvette only had two seats and Sauseda was already with defendant at the bar. According to Marco, defendant told Sommers there were others inside the bar who could help drive. Marco then left Sommers at the bar and drove herself home.

¶ 16 The next morning, Marco learned that Sommers died in a car accident the previous night. During cross-examination, Marco testified she observed Sommers drive the Corvette on prior occasions.

¶ 17 The defense presented Michael Cowsert, a certified accident reconstruction expert, who testified he reviewed photographs of the accident scene and the location of the vehicle's occupants, police reports, diagrams done by the Will County sheriff's department, DiTallo's report, photographs, and autopsy and medical reports describing the occupants' injuries. In Cowsert's opinion, there was insufficient information to determine within any degree of scientific certainty where the occupants had been seated prior to the crash. He stated that several outside forces, including vehicle parts, glass, and trees, could have changed the occupants' trajectories and their final resting positions. Therefore, the driver of the vehicle at the time of the crash could not be determined. Defendant waived his right to testify during the bench trial.

¶ 18 The trial court found defendant guilty of all four counts of aggravated DUI, and subsequently denied defendant's motion for new trial. On March 31, 2011, the court sentenced

defendant to 13 years' imprisonment for each of the four counts, with the sentences running concurrently. Defendant filed a timely direct appeal.

¶ 19 Defendant raised two issues on direct appeal: (1) whether he was proven guilty of aggravated DUI beyond a reasonable doubt and (2) whether he knowingly and voluntarily waived his right to a jury trial. *People v. Scott A. Rossow*, 2012 IL App (3d) 110283-U. This court held the State provided sufficient evidence for the court to find defendant guilty of aggravated DUI and defendant voluntarily waived his right to a jury trial. *Id.* The mandate affirming the convictions was issued on May 8, 2012.

¶ 20 Subsequently, defendant, through his attorney, filed a postconviction petition on June 20, 2013, under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2012)) with his affidavit and the affidavit of his girlfriend, Whitney Krepps, attached to the petition. In the postconviction petition, defendant raised five constitutional claims with one claim being relevant to this appeal. Specifically, in his postconviction petition, defendant alleged that Sommers' girlfriend, Elizabeth Marco, made a statement to defendant's girlfriend, Whitney Krepps, weeks before the accident indicating that on one occasion Sommers drove the same vehicle involved in the crash at a high speed, which frightened her. The attached affidavit from Krepps stated:

> "1. A few weeks before the accident involving my boy friend [*sic*] Scott A. Rossow, David Sauseda, and Christopher Sommers in December of 2006, I and Scott met with Christopher and his girlfriend Elizabeth Marco at a Chilis [*sic*] restaurant. Christopher had driven to the restaurant with Elizabeth in the white Corvette that was loaned to him by David Sauseda, Scott's brother. This was the same car that was ultimately involved in the accident.

2. When we all sat down to eat at the restaurant, Elizabeth Marco stated that Chris' driving that day made her nervous because he had driven the Corvette about 100 mile per hour on the highway. She said she did not want to drive home with him if he continued to drive so recklessly.

3. I know that Christopher Sommers had borrowed this same car on other occasions.

4. I know Scott told his trial lawyers to talk to me about the above information but they never once did."

¶ 21 In his own affidavit submitted with his postconviction petition, defendant stated that he asked his attorneys to interview Marco and to call her as a witness on defendant's behalf based on a statement Marco made to defendant about Sommers' statement to her on the night of the crash. Defendant's affidavit asserted that Marco told defendant that, before Marco left Sommers at the bar on the night of the crash, Sommers told her at that time that Sommers intended to drive both defendant and Sauseda home from the bar because Sommers believed they were both drunk. Defendant's affidavit alleged his lawyers did not personally interview Marco, or call her as a defense witness, or cross examine her during her testimony for the State about the statement Sommers made to her before she left him at the bar with his friends. Defendant's postconviction petition argued that his attorneys' omissions made it impossible for his attorneys to offer plausible explanations to demonstrate that Sommers may have been driving the vehicle at the time of the crash.[1]

[1]Defendant's postconviction petition did not include an affidavit by Marco attesting to these statements Krepps and defendant claimed she made, or provide any explanation as to why defendant did not obtain an affidavit from Marco.

¶ 22 On August 22, 2013, the court entered a written, four-page, summary order denying defendant's postconviction petition. The court found that the witnesses' statements in the affidavits amounted to "mostly hearsay," and would have been inadmissible at trial.[2] The trial court's order stated it reviewed defendant's postconviction petition and attachments, and the court found the allegations in the postconviction petition "are frivolous, patently without merit, and fail to raise a sufficient constitutional question upon which relief can be granted." The court then summarily dismissed defendant's postconviction petition.

¶ 23 Defendant filed a timely notice of appeal challenging the court's denial of his postconviction petition.

¶ 24 ANALYSIS

¶ 25 On appeal, defendant claims the trial court erred by summarily dismissing his postconviction petition because the petition stated a valid claim for ineffective assistance of counsel. Additionally, for the first time, defendant argues his mittimus should be corrected to reflect only one count of aggravated DUI for each decedent, for a total of two convictions rather than four.

¶ 26 In Illinois, the Act provides the procedures to be used by defendants serving a criminal sentence of imprisonment to assert that their convictions were the result of a substantial denial of their rights under the United States Constitution, the Illinois Constitution, or both. 725 ILCS 5/122-1 *et seq.* (West 2012). Under section 122-2.1(a), the trial court must examine any postconviction petition filed by a defendant within 90 days after the filing and docketing of each petition and enter an order thereon pursuant to this section. 725 ILCS 5/122-2.1(a) (West 2012). If the court determines the postconviction petition is "frivolous or is patently without merit, it

[2]The court also addressed the other four constitutional issues raised in defendant's postconviction conviction. However, those findings are not relevant to the instant appeal.

shall dismiss the petition in a written order, specifying the findings of fact and conclusions of law it made in reaching its decision." *Id.* This court reviews the trial court's summary dismissal of a postconviction petition without an evidentiary hearing *de novo. People v. Pitsonbarger*, 205 Ill. 2d 444, 456 (2002); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009).

¶ 27 In this case, defendant alleges his postconviction petition should not have been dismissed as frivolous because it raised a valid claim that defense counsel was ineffective. Defendant argues the petition stated a valid claim that defense counsel failed to investigate or cross-examine Marco about her two prior statements that would have assisted the defense in proving that Sommers was driving the Corvette at the time of the crash. The first statement involved Sommers' declaration of his future intent to drive his friends home from the bar on the night of his death. The second statement involved Marco's complaint to Krepps, reporting that Sommers operated the same Corvette at a speed of 100 mph on one occasion just a few weeks before his death.

¶ 28 Generally, the out-of-court statements of persons who are deceased at the time of trial are subject to heightened scrutiny. In a civil context, such statements are subject to the Dead-Man's Act. 735 ILCS 5/8-201 (West 2012). In a criminal context, section 115-10.4(d) of the Code of Criminal Procedure of 1963 (the Code) precludes the admission of out-of-court statements by a declarant who is deceased at the time of trial unless the statement was under oath and subject to cross-examination or the statement qualifies pursuant to another exception to the hearsay rule. 725 ILCS 5/115-10.4(d) (West 2012).

¶ 29 In this case, defendant argues the statement of his deceased friend would have been admissible pursuant to another exception to the hearsay rule, since the statement expressed Sommers' future intent. As defendant emphasizes on appeal, this narrow exception focuses on

the nature of the out-of-court statement itself, rather than the unavailability of the declarant. Defendant argues defense counsel was ineffective for failing to investigate and then offer evidence concerning Sommers' prior statement to Marco concerning his intent to drive his friends home from the bar on the night of the crash.

¶ 30 Yet, Marco did not submit an affidavit verifying this conversation took place between Marco and Sommers before she left the bar. It is well established that affidavits should " 'be made on the personal knowledge of the affiants' " and should " 'affirmatively show that the affiant, if sworn as a witness, [could] testify competently thereto.' " *People v. Coleman*, 2012 IL App (4th) 110463, ¶ 53 (quoting Ill. S. Ct. R. 191(a) (eff. July 1, 2002)). In a situation where a supporting affidavit based on firsthand information or personal knowledge is not attached to a postconviction petition, and this "absence is neither explained nor excused, the trial court should either dismiss the petition or grant a further time within which such affidavits may be obtained." *People v. Coleman*, 183 Ill. 2d 366, 380 (1998).

¶ 31 In this case, defendant's affidavit did not explain the reason Marco had not submitted her own affidavit. Further, Marco's testimony during trial indicated that before she left Sommers at the bar, she overheard defendant assure Sommers that there were other friends in the bar who could help drive, since Sauseda's Corvette only had two seats.

¶ 32 Moreover, defendant's affidavit relied on a double hearsay statement that is difficult to follow. Specifically, defendant's affidavit claimed that sometime before the date of trial, Marco told defendant that Sommers told Marco when she was at the bar that Sommers intended to drive defendant and Sauseda home from the bar on the night of the crash.[3] We conclude the double hearsay statement about Sommers' future intent to drive was inherently unreliable.

[3]We note that Marco testified for the State during the bench trial and, although defense counsel did not ask Marco questions about these two specific statements, defense counsel did ask and Marco acknowledged that Sommers had driven the Corvette on occasions prior to the crash.

¶ 33 Next, defendant contends that Krepp's affidavit also established grounds for ineffective assistance of counsel on another basis. Specifically, Krepps' affidavit stated that Marco told Krepps that Sommers was driving the same Corvette at an excessive rate of speed several weeks before the crash. However, even if the trial court found the information set out in Krepps' affidavit was reliable, the information would not have been admissible as evidence of Sommers' propensity to be a reckless driver when operating the Corvette. The case law provides that the fact Sommers drove recklessly on one prior occasion does not qualify as evidence of bad character or a pattern of conduct that would be admissible as character evidence in court. See *People v. Cookson*, 215 Ill. 2d 194, 213 (2005).

¶ 34 For example, at common law, other crimes evidence was not admissible to show a person's propensity to commit a crime. *People v. Watkins*, 2015 IL App (3d) 120882, ¶ 44. This court, in *Watkins*, noted that the common law principle has since been codified in Rule 404(b) of the Illinois Rules of Evidence, which now provides, in pertinent part, that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." *Id.* (quoting Ill. R. Evid. 404(b) (eff. Jan. 1, 2011)). Therefore, we conclude the trial court properly summarily dismissed defendant's postconviction petition as frivolous.

¶ 35 Finally, defendant contends that his mittimus should be corrected to reflect only two convictions for aggravated DUI, one for each victim, based on the one-act, one-crime principle. Whether a defendant's mittimus should be corrected based on this principle is a question of law, which we review *de novo*. *People v, Artis*, 232 Ill. 2d 156, 161 (2009); *People v. Harris*, 2012 IL App (1st) 092251, ¶ 34. We note defendant could have raised, but did not raise, this issue on direct appeal.

¶ 36 In the instant case, the State concedes that defendant should only be convicted of one count of aggravated DUI for each deceased victim, for a total of two convictions rather than four, but argues forfeiture applies for purposes of appeal. We conclude the interests of justice excuse any issue of forfeiture and recognize the State concedes two convictions are appropriate. This court has the authority to correct a mittimus at any time, without remanding it to the trial court. *People v. Harper*, 387 Ill. App. 3d 240, 244 (2008).

¶ 37 It is well established that Illinois law prohibits multiple convictions when more than one offense is based on the same physical act. *People v. Crespo*, 203 Ill. 2d 335, 340-41 (2001). Therefore, we direct the trial court to correct defendant's mittimus to reflect one conviction for aggravated DUI involving the death of Sauseda and one conviction for aggravated DUI involving the death of Sommers. Defendant's mittimus shall further reflect that defendant is sentenced to two 13-year sentences of imprisonment to run concurrently. See *People v. Gordon*, 378 Ill. App. 3d 626, 642 (2007).

¶ 38 CONCLUSION

¶ 39 For the foregoing reasons, we affirm the trial court's denial of defendant's petition for postconviction relief, but order that the mittimus be modified to reflect two convictions for aggravated DUI and two concurrent 13-year sentences, one conviction for each victim.

¶ 40 Affirmed, as modified.

¶ 41 JUSTICE CARTER, specially concurring:

¶ 42 I concur with the order, however, I write separately regarding the defendant's affidavit that Sommers' girlfriend, Elizabeth Marco, made a statement to the defendant that Sommers intended to drive both defendant and Sauseda home from the bar. The defendant claims that his lawyers failed to examine Marco about the statement, which would have demonstrated that

Sommers was driving, not the defendant, at the time of the crash. There was no affidavit from Marco, nor an explanation, why the defendant could not obtain Marco's affidavit. At the trial, Marco testified on November 10, 2010.

¶ 43 Prior to the adoption of Illinois Rule Evidence 803(3) (eff. Jan. 1, 2011), the exception to hearsay for statements regarding the intention of the declarant in Illinois required unavailability and a reasonable probability that the hearsay statement was truthful. *People v. Caffey*, 205 Ill. 2d 52 (2001); *People v. Munoz*, 398 Ill. App. 3d 455 (2010). With the adoption of the Illinois Rules of Evidence, effective on January 1, 2011, Rule 803(3) no longer requires the unavailability or a probability that the hearsay statement was truthful. See Graham's Handbook of Illinois Evidence § 803.3 (10th ed. 2010). Neither requirement was found in the common law of many jurisdictions or in the Federal Rules of Evidence. Federal Rule of Evidence 803(3) regarding the intentions of the declarant was a codification of the United States Supreme Court landmark decision in *Mutual Life Insurance Co. of New York v. Hillmon*, 145 U.S. 285 (1892) (a case involving the death of a man killed by a firearm accident at a campsite called Crooked Creek, near Medicine Lodge, Kansas, in late 1879). The U.S. Supreme Court indicated that declarations of intention are competent evidence and often indispensible to the due administration of justice. *Hillmon*, 145 U.S. at 295-96.

¶ 44 In the instant case, the defendant's affidavit would not fall into the exception to hearsay for a declaration of intention because the declarant's statement of intent was not made to the defendant but rather to his girlfriend, Marco. In addition, the affidavit provided by the defendant cannot be said to give circumstances of considerable assurances of reliability or a reasonable probability that the statement was truthful as was required prior to January 1, 2011. Thus, I

agree with the majority's discussion that the double hearsay statement about Sommers' future intent to drive was inherently unreliable.