2015 IL App (4th) 130345-U

NOS. 4-13-0345, 4-13-0354 cons.

FILED
May 29, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
GASTON J. WOODLAND,	)	Nos. 10CF172
Defendant-Appellant.	)	12CF389
	)	
	)	Honorable
	)	Lisa Holder White,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Knecht and Turner concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Simply by omitting to call a domestic-battery victim as a witness in a probation revocation proceeding, the State did not violate defendant's constitutional right to cross-examine her as an adverse witness—considering that she was not a witness.

(2) The record offers no support for defendant's allegation that the State withheld exculpatory evidence.

(3) The material witness rule is inapplicable because defendant never confessed to the alleged violations of probation.

(4) The trial court considered defendant's consumption of alcohol only as a circumstance relevant to credibility, not as an uncharged violation of probation.

(5) Defendant has forfeited any objection to the sufficiency of the petitions charging violations of probation, and besides, the petitions gave him sufficient notice of the alleged violations.

(6) The sentences the trial court imposed when resentencing defendant are neither cruel and unusual nor disproportionate to the original offenses.

(7) Defendant's claims of ineffective assistance of counsel are unmeritorious because he has failed to identify any act or omission by defense counsel that fell outside the wide range of reasonable professional assistance.

¶ 2 After revoking probation in Macon County case Nos. 12-CF-389 and 10-CF-172, the trial court resentenced defendant, Gaston J. Woodland, to imprisonment. Defendant appeals, *pro se*, on a variety of grounds, none of which are even arguable. We affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 A. The Underlying Convictions and the Sentences to Probation

¶ 5 On October 8, 2010, in a bench trial in case No. 10-CF-172, the trial court found defendant guilty of aggravated driving under the influence of alcohol (625 ILCS 5/11-501(d)(1)(H) (West 2010)), criminal trespass to vehicles (720 ILCS 5/21-2 (West 2010)), and driving while his driver's license was suspended (625 ILCS 5/6-303(a) (West 2010)).

¶ 6 On February 7, 2011, for those offenses, the trial court sentenced defendant to 24 months' probation and various fines. One of the conditions of probation was that he refrain from violating any criminal statute. Another condition was that he abstain from alcohol.

¶ 7 On June 20, 2012, in case No. 12-CF-389, defendant entered a negotiated plea of guilty to aggravated domestic battery (720 ILCS 5/12-3.3(a-5) (West 2010)). The trial court sentenced him to 24 months' probation, commencing on that date, and to fines. Again, one of the conditions of probation was that he refrain from violating any criminal statute.

¶ 8 B. The Petitions Charging Violations of Probation

¶ 9 On October 1, 2012, in case No. 10-CF-172, the State filed a "Second Petition Charging Violation of Probation." (In June 2012, in a hearing on the "First Petition Charging Violation of Probation," the trial court extended probation for 24 months.) The second petition

alleged that defendant had again violated a condition of probation, this time by committing the following offenses:

> "1. Defendant has committed the new offenses of Domestic Battery with A Prior Domestic Battery Conviction, Unlawful Restraint, Criminal Damage to Property over $300, Criminal Trespass to Real Property, and Resisting A Police Officer, as alleged in Macon County cause [No.] 12-CF-1368." (Underlining omitted.)

¶ 10 Simultaneously, in case No. 12-CF-389, the State filed a petition charging defendant with violating the probation in that case by committing the same offenses, "as alleged in Macon County cause [No.] 12-CF-389." (Underlining omitted.)

¶ 11 C. The Hearing on the Petitions

¶ 12 On November 29, 2012, the trial court held a consolidated hearing on the petitions charging violations of probation. At the beginning of the hearing, the prosecutor told the court she had no intention of offering any evidence that the amount of the alleged property damage was over $300. Therefore, she moved to amend the petitions so as to delete the phrase "over $300." The court granted the motion.

¶ 13 The State then called its witnesses, and after the State rested, defendant took the stand and testified. The witnesses testified substantially as follows.

¶ 14 1. *Benjamin West*

¶ 15 Benjamin West, age 29, and his wife, Andrea West, lived in a house at 2111 East Wood Street in Decatur. They had a neighbor, Whitney Jepson, who lived in the house next door, to the north.

¶ 16 A little after 10 p.m. on September 22, 2012, Benjamin West and his wife were in a Mustang. He was driving. They were approaching their house, returning home. As he pulled up to a stop sign, he saw two people in his driveway, that is, in the driveway of his and his wife's house. It was dark outside, but a streetlight was about 20 feet from the house, and the lighting was adequate to see what was happening. "[T]here was a black male over a black female sitting in [the] driveway," and "[h]e had her by the collar, by the throat, and was punching her." Because the windows of the car were rolled up, Benjamin West could not make out what the man and the woman were saying to one another, "but they were yelling." As he drove across the street to pull into the driveway, the man began dragging the woman across the yard. The woman was their neighbor, Jepson.

¶ 17 Benjamin West parked in the driveway. As he got out of the car, he already was on the telephone with the police. The man, the assailant, followed Benjamin and Andrea West onto the front porch of their house, imploring them not to call the police. It was defendant (Benjamin West identified him in court), and his breath smelled like alcohol. Still on the telephone with the police, Benjamin West escorted his wife into their house and closed the door on defendant. Through the peephole, he watched defendant leave the porch. He had not seen any weapon on him.

¶ 18 After finishing talking with the police on the telephone, Benjamin West went back outside, and he heard a hissing sound. Two cars were parked in his driveway: his Chrysler and his wife's Mustang, which he had just finished driving. The passenger-side tires on both cars were deflating. All four tires had knife incisions in them.

¶ 19 2. *Andrea West*

¶ 20 Andrea West, age 25, likewise testified she saw defendant and "his girlfriend" "fighting" and yelling at one another in the driveway. She also testified she saw him dragging her, by the collar or neck, across the lawn, onto "her lawn," that is, Jepson's lawn. She noticed that two additional people, a male and a female, were outside, too.

¶ 21 As Andrea West and her husband were on their front porch, trying to get into their house, defendant came up on the porch and begged them not to call the police. Her husband was on the telephone with the police at that very moment. Because Andrea West had just had sinus surgery and her nose was plugged up, she could not tell if defendant had alcohol on his breath. They both told defendant to get off their property. He did not immediately comply.

¶ 22 After the police arrived, Andrea West came out of the house and noticed that tires on both her husband's Chrysler and her Mustang had been slashed.

¶ 23 3. *Brianna Snyder*

¶ 24 On September 22, 2012, Brianna Snyder, age 19, was living with her cousin, Jepson, in a house on East Wood Street. Two men also lived there: Shane Huff, who was Snyder's boyfriend, and defendant, who was Jepson's boyfriend.

¶ 25 Around 10 p.m. on September 22, 2012, defendant flipped over a table in Jepson's house. Snyder had consumed only one glass of hard liquor that night. She had not become intoxicated. Her second glass of liquor spilled when defendant overturned the table.

¶ 26 Jepson walked out of the house. Defendant followed her. Snyder and Huff also went outside. As the neighbors pulled up, Snyder saw defendant drag Jepson across the yard and punch her in the face. Jepson was 5 feet 2 inches or 5 feet 3 inches tall and weighed 130 or 140 pounds. Snyder never saw Jepson grab or hit defendant.

¶ 27 Snyder, Huff, and Jepson then went back inside. Soon defendant came back inside, too, and he had a steak knife. He warned Jepson that if he went to jail, he would come back and stab her.

¶ 28 4. *Sean Bowsher*

¶ 29 Sean Bowsher, a Decatur police officer, responded to the call of a domestic disturbance. Another Decatur police officer, Brent Morey, arrived. After speaking with Benjamin and Andrea West and seeing the four tires with half-inch incisions in them, Bowsher went with Morey to the house next door, 2097 East Wood Street.

¶ 30 The house was dark. They knocked repeatedly, but no one answered. Bowsher shone his flashlight into a window and saw people inside, and he heard them talking. A woman's voice said something to the effect of "hiding him in the basement." Huff finally answered the door after Bowsher threatened to kick it down.

¶ 31 Huff, who was intoxicated, cooperated with an interview. Snyder likewise was cooperative. She did not appear to be intoxicated. Jepson was extremely intoxicated and uncooperative.

¶ 32 Bowsher handcuffed defendant and put him in the squad car. Defendant appeared to be very intoxicated. He reeked of alcohol, his speech was slurred, and he was unsteady on his feet. He uttered obscenities about Bowsher and his family. Also, defendant persisted in passing the chain under his feet so that his hands were in front. After telling defendant a half-dozen times to keep his hands behind his back, Bowsher sprayed him in the face with pepper spray, compelling him to obey.

¶ 33 5. *Brent Morey*

¶ 34 Brent Morey confirmed that defendant was intoxicated when they arrested him. His eyes were bloodshot and glassy. His speech was slurred, and his walking ability was impaired.

¶ 35 6. *Defendant*

¶ 36 Defendant testified that all he did the night of September 22, 2012, was accidentally bump into Jepson, causing her to spill her drink. Because her glass contained the last of the alcohol in the house, she became excessively and irrationally upset. He told her it was a simple matter to go to the store and buy more alcohol. He followed her outside to try to calm her down. He never hit her. He never manhandled her in any way. There was no physical altercation. He testified: "I mean, I'm a pretty strong man. If I punch a woman, it's going to be some kind of bruising or knot, blood or something of that nature." He merely tried to coax her to her feet because the neighbors were coming home and she was in their driveway. He himself was not drunk; he had consumed only a couple of drinks. But she was quite drunk—and thus she needed his help.

¶ 37 When he saw Benjamin West on the telephone, he surmised he had gotten the wrong impression and that he was calling the police. He went over and tried to explain to him that he merely had helped Jepson to her feet without intending to do her any harm

¶ 38 Defendant denied damaging his neighbors' property. He denied he was holding a knife when he came back into the house.

¶ 39 As for the difficulties en route to the police station, the handcuffs were cutting into his wrists, and he could not bear the pain. He had to get some relief by putting the handcuffs in front of him.

¶ 40 During closing arguments, defense counsel questioned the reliability of Snyder's testimony because, by her own admission, she had been drinking and as an underage person, she might have been unaccustomed to alcohol. The prosecutor responded that the police officers saw no indication that Snyder was intoxicated but it was clear to them that defendant was intoxicated. And, besides, the prosecutor added, there was no evidence that either Benjamin West or Andrea West had been drinking.

¶ 41 After the closing arguments, the trial court stated:

> "I understand that we have some individuals involved in this matter who have been consuming alcohol. However, the officers testified and Mr. West testified as to the defendant's level of intoxication in terms of smelling the alcohol with Mr. West and then even in the more detail with the officers. So the Court finds that the State has sustained it[]s burden of proof as to the first petition charging violation of probation as amended and as to the second petition charging violation of probation as amended."

¶ 42 D. Resentencing

¶ 43 In January 2013, the trial court held a resentencing hearing in the two cases. In case No. 10-CF-172, the court revoked probation and resentenced defendant to three years' imprisonment for aggravated driving under the influence. In case No. 12-CF-389, the court revoked probation and resentenced him to five years' imprisonment for aggravated domestic battery. The court ordered that the sentences would run concurrently.

¶ 44 In April 2013, the trial court denied motions to reconsider the sentences.

¶ 45 This appeal followed.

¶ 46 II. ANALYSIS

¶ 47 A. Confrontation Clause

¶ 48 Defendant claims that by failing to call Jepson as a witness in its own case, the State violated his right to confront adverse witnesses. See U.S. Const., amend. VI; Ill. Const. 1970, art. I, § 8; 730 ILCS 5/5-6-4(c) (West 2012).

¶ 49 Because Jepson was not a witness in the trial and because no testimonial statement by her was used against defendant in the trial, his theory of a violation of the confrontation clause fails. See *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004); *People v. Puente*, 125 Ill. App. 3d 152, 156-57 (1984).

¶ 50 In a case that defendant does not mention, *Puente*, the defendant made essentially the same argument that defendant makes in the present case. The defendant in *Puente* argued that "Lupe Hernandez, as the 'victim of the alleged attempt murder' was, in fact, the ultimate witness against him" and that by "fail[ing] to call Hernandez as a witness or to establish his unavailability for trial," the State had "violated [the defendant's] right of confrontation." *Id.* at 156. The appellate court responded:

> "We find no merit in this contention. Defendant's argument that Hernandez was a witness against him solely because he was the victim of the shooting here at issue is specious. It is not disputed that Hernandez was shot as a result of an altercation with defendant. However, he was not a sworn witness in the instant trial nor was his testimony introduced into evidence in any form. [Citation.] He, therefore, was not a 'witness' against defendant;

> accordingly, defendant had no constitutionally guaranteed right to cross-examine him.
>
> Moreover, the State is not required to call every witness to a crime in order to sustain its burden of proof. [Citations.] The State was, therefore, under no duty to call Lupe as a witness if it could meet its burden of proof without his testimony. Further, the witness in question was known to defendant and could have been called by him to testify. Having failed to do so, defendant cannot claim prejudice by the State's failure to call him. [Citation.]" *Id.* at 156-57.

¶ 51 In his reply brief, defendant argues that, in *People v. McClanahan*, 191 Ill. 2d 127, 139 (2000), the supreme court "emphatically rejected *** any notion that the State's constitutional obligation to confront the accused with the *witnesses* against him can be satisfied by allowing the accused to bring the State's *witnesses* into court himself and cross-examine them as part of his defense." (Emphases added.) True, the supreme court did so hold in *McClanahan*, but, again, Jepson was not a witness against defendant. For Jepson to be a witness against defendant for purposes of the confrontation clause, the State would have had to call her as a witness or present testimonial hearsay by her. *Crawford*, 541 U.S. at 68-69; *Puente*, 125 Ill. App. 3d at 157. The State did neither. In *McClanahan*, the supreme court debunked the notion that the confrontation clause (U.S. Const., amend. VI) allowed testimonial hearsay if the defendant himself could have subpoenaed the declarant but omitted to do so. *McClanahan*, 191 Ill. 2d at 138. In the present case, there was no testimonial hearsay by Jepson. There was no

out-of-court statement by her at all. The State never introduced her testimony in any form. *McClanahan* is inapplicable because there was no "[t]rial by affidavit" in this case. *Id.*

¶ 52 B. *People v. Moses*

¶ 53 Defendant quotes *People v. Moses*, 11 Ill. 2d 84, 89 (1957): "Where it appears that there is evidence in the possession and control of the prosecution favorable to the defendant, a right sense of justice demands that it should be available, unless there are strong reasons otherwise." (Internal quotation marks omitted.)

¶ 54 It is difficult to see how *Moses* has any relevance to defendant's case. In *Moses*, defense counsel "had reason to believe that the statements made to the police officers by the witnesses on the day the crime was committed differed from their testimony, and he subpoenaed certain police department records." *Id.* at 88. The trial court exempted two of the subpoenaed documents from production, holding they were " 'inter-departmental records which [were] not public records and [were] therefore not subject to subpoena.' " *Id.* The supreme court reversed the trial court's judgment, holding that "an accused person [was] entitled to the production of a document that [was] contradictory to the testimony of a prosecution witness." *Id.* at 89. In the present case, the record contains no indication that the government possessed documents contradicting anything that the prosecution witnesses said on the stand. Therefore, *Moses* is inapplicable.

¶ 55 C. *People v. Bell*

¶ 56 Citing *People v. Bell*, 50 Ill. App. 3d 82 (1977), defendant argues: "The material witness rule requires that the State either produce or explain the absence of all material witnesses to an allegedly involuntary confession."

¶ 57 *Bell* did indeed say that the State had to "produce all material witnesses to an allegedly involuntary confession, or satisfactorily explain their absence." *Id.* at 86. Unless the State did so, the confession would be inadmissible, because the State had the burden of proving the confession was voluntary and failing to produce all material witnesses to the confession, or to explain their absence, was, *ipso facto*, a failure to carry that burden. *Id.* at 87.

¶ 58 *Bell* is irrelevant. Defendant never made a confession in this case—involuntary or otherwise. Rather, he denied "commit[ing] the new offenses of Domestic Battery with A Prior Domestic Battery Conviction, Unlawful Restraint, Criminal Damage to Property, Criminal Trespass to Real Property, and Resisting A Police Officer" (to quote from the petitions).

¶ 59 D. Defendant's Use of Alcohol

¶ 60 According to defendant, the trial court found he had violated probation by consuming alcohol, and the court thereby violated his right to due process, since neither of the petitions gave him advance notice that consumption of alcohol would be one of the bases for revoking probation. "The minimum requirements of due process for a probation revocation hearing require that the defendant be given written notice of the claimed violation and an opportunity to defend against the charge." *People v. Good*, 66 Ill. App. 3d 32, 33 (1978).

¶ 61 The trial court never said, though, that defendant's consumption of alcohol was one of the reasons why the court was revoking probation. The key to the court's meaning is in the sentence "I understand that we have some individuals involved in this matter who have been consuming alcohol." In his testimony, defendant had represented to the court that Jepson was intoxicated and out of control the night of September 22, 2012, and that he was the sober, concerned friend gently trying to shepherd her to safety. Also, defense counsel had argued that Snyder was an unreliable witness because, by her own admission, she had been drinking. In

effect, the court said that, given the choice between believing Snyder and defendant, the court would believe Snyder because defendant, unlike Snyder, was clearly intoxicated that night. And for the same reason, the court disbelieved defendant's portrayal of himself as the sober, concerned friend. The significance of defendant's drinking was credibility, not a violation of probation.

¶ 62 E. The Sufficiency of the Pleading

¶ 63 Both of the petitions alleged that defendant had committed domestic battery with a prior domestic battery conviction, unlawful restraint, criminal damage to property, criminal trespass to real property, and resisting a police officer, "as alleged in Macon County cause [No.] 12-CF-1368." (Underlining omitted.) Defendant has provided us a copy of count II of the information in Macon County case No. 12-CF-1368, the count charging him with unlawful restraint (720 ILCS 5/10-3 (West 2010)). He contends that count II is vague and that the unlawful restraint statute, section 10-3, is "void for vagueness."

¶ 64 In a case that defendant does not mention, *People v. Wisslead*, 108 Ill. 2d 389, 397 (1985), the supreme court rejected the contention that the unlawful restraint statute was unconstitutionally vague.

¶ 65 As for the pleadings at issue in the present case, they are not, as defendant calls them, "information[s]." Rather, they are petitions charging violations of probation—and he never challenged their sufficiency in the trial court. Such a challenge would have been futile. We paraphrase the Second District in *People v. Monick*, 51 Ill. App. 3d 783, 787 (1977): "This question does not appear to have been raised in the trial court and is therefore [forfeited]. [Citation.] In any event, we find the petition[s] [to be] adequate. The defendant is entitled to be

informed of the claimed offending conduct from the allegations of a petition to revoke probation, but the same specificity required in an indictment or information is not necessary."

¶ 66 F. Cruel and Unusual Punishment

¶ 67 Defendant says: "The determination of the [trial] court to violate and revoke [defendant's] probation was cruel and unusual [punishment within the meaning of the eighth amendment (U.S. Const., amend. VIII)] due to his punishment being grossly disproportionate to the crimes in question."

¶ 68 The revocation of probation, in itself, was not punishment. See *People v. Ward*, 80 Ill. App. 3d 253, 257 (1980). Rather, it was merely the enforcement of a condition to which defendant agreed, by his signature, at the time the trial court granted probation. The resentencing was on the original crimes. See *id.* at 258.

¶ 69 We disagree that three years' imprisonment is "grossly disproportionate" to the offense of aggravated driving under the influence of alcohol and that five years' imprisonment is "grossly disproportionate" to the offense of aggravated domestic battery. Neither of these punishments is "cruel, degrading, or so wholly disproportionate to the offense that it shocks the moral sense of the community," and to our knowledge, neither of these punishments "differs from one imposed for an offense containing the same elements." (Internal quotation marks omitted.) *People v. Leach*, 385 Ill. App. 3d 215, 220 (2008). See *People v. McDonald*, 168 Ill. 2d 420, 455 (1995) (the disproportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11) is "synonymous with the cruel and unusual punishment clause of the eighth amendment").

¶ 70 G. Ineffective Assistance

¶ 71 Defendant accuses his defense counsel of rendering ineffective assistance in the probation revocation proceeding in that she "failed to secure his right to confront and cross[-]examine all adverse witnesses, failed to object to the erroneous finding of the court on the basis of incompetent evidence and procedural due process violations and also failed to notice the defective/vague pleading which was in fact void for vagueness."

¶ 72 Actually, defense counsel cross-examined all of the adverse witnesses. The adverse witnesses were the witnesses the State called in the evidentiary hearing of September 22, 2012. Defense counsel cross-examined each of them. It is unclear what defendant means by "incompetent evidence." All the evidence the trial court heard was admissible. There was no violation of due process to which defense counsel could object. The petitions alleging violations of probation were adequate to inform defendant of the "claimed offending conduct." *Monick*, 51 Ill. App. 3d at 787. Defendant has failed to identify any act or omission by defense counsel that fell outside "the wide range of reasonable professional assistance." *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

¶ 73 III. CONCLUSION

¶ 74 For the foregoing reasons, we affirm the trial court's judgment, and we award the State $50 in costs against defendant.

¶ 75 Affirmed.