2015 IL App (4th) 140004-U

NO. 4-14-0004

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
December 22, 2015
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
T.C. WILDER,	)	No. 13CF595
Defendant-Appellant.	)	
	)	Honorable
	)	Scott B. Diamond,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Holder White and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: On direct appeal, the appellate court declined to reach the merits of defendant's claim of ineffective assistance of trial counsel, finding the claim is better pursued in a postconviction proceeding where a complete record explaining counsel's conduct can be made.

¶ 2 After a jury trial, defendant, T.C. Wilder, was convicted of aggravated battery and sentenced to eight years in prison. Defendant appeals, claiming his trial counsel rendered ineffective assistance when he (1) failed to file a motion *in limine* to challenge the State's use of defendant's prior convictions, and (2) referred to defendant's prior convictions in his closing argument. Defendant argues this error was especially egregious because two of the prior offenses were substantially similar to the offense for which defendant was on trial. We decline to consider defendant's claim because the answer to whether counsel's decision was one of trial strategy is currently *dehors* the record. We have previously held in similar cases a claim of

ineffective assistance of counsel is often better made in proceedings on a petition for postconviction relief, where a complete record can be made. See *People v. Kunze*, 193 Ill. App. 3d 708, 726 (1990). We hold likewise here and affirm.

¶ 3 I. BACKGROUND

¶ 4 In May 2013, the State charged defendant with aggravated battery (720 ILCS 5/12-3.05(a)(1) (West 2012)) (count I), unlawful restraint (720 ILCS 5/10-3(a) (West 2012)) (count II), and unlawful possession of a controlled substance as a subsequent offense (720 ILCS 570/402(c) (West 2012)) (count III). The trial court allowed the State's motion to sever count III.

¶ 5 In August 2013, the trial court conducted a jury trial on counts I and II. Because defendant does not challenge the sufficiency of the evidence, we summarize only that testimony necessary for a basic understanding of the factual circumstances of this case. At the trial, the State called as witnesses: (1) Jennifer Hunter, the victim; (2) Amy Cochran, Hunter's friend, landlord, and neighbor; and (3) Eric Waggoner, the Decatur police officer who investigated the incident. The State also presented as evidence photographs taken by Waggoner of Hunter's injuries. Defendant's case consisted only of his own testimony.

¶ 6 Hunter and defendant met and became friends in April 2013. They often watched television, drank beer, smoked marijuana, and played cards together. On May 6, 2013, at approximately 3 p.m., Hunter went to defendant's house to do homework and play cards. She took two 40-ounce beers with her for both to share. At approximately 4 p.m., defendant left his house to help someone mow a lawn, leaving Hunter at his house alone. After a few hours, Hunter became bored and left a note for defendant, stating she had gone across the street to a tavern to wait for him to return. At approximately 10 p.m., defendant went to the tavern to retrieve Hunter for their anticipated card game.

¶ 7 According to Hunter, after a "few hands," defendant "punched [her] out of [the] blue and then it just went from there." Hunter said defendant hit, kicked, and stomped her in the face, chest, legs, and arms. She said he dragged her through his house by her hair, told her she could not leave, and threatened to kill her. Defendant, on the other hand, said Hunter first attacked him and he merely defended himself by hitting her. He said when she left his house, she had not suffered the injuries depicted in the photographs. He claimed Hunter's ex-boyfriend may have inflicted the injuries after she had left defendant's house.

¶ 8 The jury found defendant guilty of aggravated battery and not guilty of unlawful restraint. Defendant filed a posttrial motion, which the trial court denied. The court sentenced defendant to eight years in prison. The court denied defendant's postsentencing motion as well.

¶ 9 This appeal followed.

¶ 10 II. ANALYSIS

¶ 11 Defendant argues his trial counsel was ineffective for failing to file a motion *in limine* challenging the admissibility of his prior convictions, two of which were substantially similar to the current offense. He claims his counsel deprived him of a fair trial by failing to request the trial court to conduct a *Montgomery* balancing test to determine if the probative value of defendant's four prior convictions was substantially outweighed by the danger of unfair prejudice (*People v. Montgomery*, 47 Ill. 2d 510, 516 (1971)). In particular, defendant believes a competent attorney would have certainly challenged two of those convictions (aggravated domestic battery and domestic battery) as being substantially similar to the offense for which he was being tried.

¶ 12 In this case, at the close of evidence and outside the jury's presence, the following colloquy occurred:

"[THE PROSECUTOR]: Judge, I do have another matter. If [defendant] chooses to testify, of course, he can, in the course of his testimony, acknowledge his prior convictions. But I've discussed with counsel the three of his that I believe would be appropriate for the State to use as impeachment, if he testifies.

And so, the cases I'm referring to are 2011-CF-1189 where the defendant was convicted on December 1, 2011, of the offense of unlawful possession of controlled substance with a prior conviction.

There's also 2009-CF-697 where the defendant, on November 5, 2000, was convicted of retail theft with a prior retail theft conviction.

There is 2004-CF-1337 where the defendant was convicted on February 24, 2005, of the offenses of aggravated domestic battery and domestic battery. And, I believe, that if the defendant chooses to acknowledge those offenses, then that's the end of it. If he does not, then the State would present the certified copies of conviction in rebuttal.

THE COURT: They're all within the *Montgomery* rule?

[THE PROSECUTOR]: I believe they all are, Your Honor.

THE COURT: Okay. [Defense counsel], does your client understand that he can either admit them or they may be admitted in rebuttal?

* * *

THE COURT: Is he gonna choose to admit or you want to wait to tell us or?

[DEFENSE COUNSEL]: No. I mean we can admit them now if you want or he's going to admit those on the stand."

¶ 13 Defendant also challenges counsel's conduct during his closing argument, where he stated: "Should we, in fact, hold that against him and say [']well, you're guilty of aggravated domestic battery[,] [a]nd, therefore, we find you guilty.['] I don't think so."

¶ 14 Ineffective assistance of counsel claims are judged under the now familiar standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). To establish ineffective assistance of counsel, a defendant must first demonstrate that his defense counsel's performance was deficient in that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the [s]ixth [a]mendment." *Strickland*, 466 U.S. at 687. In so doing, a defendant must overcome the strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not of incompetence. *Strickland*, 466 U.S. at 689. Second, a defendant must demonstrate a reasonable probability that, but for defense counsel's deficient performance, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. Both prongs of the *Strickland* test must be satisfied before a defendant can prevail on a claim of ineffective assistance of counsel. *People v. Coleman*, 183 Ill. 2d 366, 397-98 (1998).

¶ 15 In *Kunze*, 193 Ill. App. 3d at 726, this court held adjudication of a claim of ineffective assistance of counsel is often better made in proceedings on a petition for postconviction relief, where a complete record can be made. In *Kunze*, the ineffective assistance

of counsel claim turned on whether the defendant would have testified had he known in advance that the State would use his prior convictions to impeach him. *Kunze,* 193 Ill. App. 3d at 725. Because nothing in the record permitted such a determination to be made, this court declined to adjudicate the defendant's claim. *Kunze*, 193 Ill. App. 3d at 725-26.

¶ 16 As in *Kunze*, the record here contains nothing to review with respect to counsel's conduct regarding the State's use of defendant's prior aggravated domestic battery and domestic battery convictions for impeachment purposes. We are unable to discern (1) why counsel did not file a motion *in limine* challenging the State's use of defendant's prior convictions, (2) why counsel did not object to the admission of defendant's prior convictions at trial; (3) why counsel mentioned defendant's aggravated domestic battery conviction in his closing argument, and (4) whether counsel's decision constituted a trial tactic or incompetence. Because the answers to the questions pertinent to defendant's claim are currently *dehors* the record, we decline to consider them. See *People v. Calvert*, 326 Ill. App. 3d 414, 421 (2001). Rather, defendant's claim may be brought under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2012)). See *People v. Holloman*, 304 Ill. App. 3d 177, 186 (1999) (citing *Kunze*, this court on direct appeal declined to address whether trial counsel's failure to make a motion to suppress evidence constituted ineffective assistance); *People v. Flores*, 231 Ill. App. 3d 813, 827-28 (1992) (this court could not determine whether trial counsel's conduct constituted incompetence or trial strategy and recommended the claim be brought in a postconviction petition); *In re Carmody*, 274 Ill. App. 3d 46, 56 (1995) (noting the record on direct appeal rarely contains sufficient information regarding counsel's tactics).

¶ 17 Accordingly, consistent with the line of authority beginning with *Kunze*, we likewise hold as follows: "Because the answers to the questions pertinent to defendant's claim

are currently *de[]hors* the record, we decline to consider them. Instead, defendant may pursue his claim under the [Act] (725 ILCS 5/122-1 through 122-8 (West 2002))." *People v. Durgan*, 346 Ill. App. 3d 1121, 1143 (2004).

¶ 18 III. CONCLUSION

¶ 19 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 20 Affirmed.