2016 IL App (4th) 121039-UB

NO. 4-12-1039

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
February 8, 2016
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
KEVIN E. HEMINGWAY,	)	No. 09CF1438
Defendant-Appellant.	)	
	)	Honorable
	)	Heidi N. Ladd,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Harris and Pope concurred in the judgment.

ORDER

¶ 1 *Held*: Because it is arguable that by choosing not to call an alibi witness, defense counsel made an objectively unreasonable decision, and because it is arguable that, but for the lack of this alibi witness, there is a reasonable probability of a different outcome, the trial court erred by summarily dismissing the postconviction petition.

¶ 2 Defendant, Kevin E. Hemingway, who is serving a sentence of 35 years' imprisonment for armed robbery (720 ILCS 5/18-2(a)(2) (West 2008)), appeals from the summary dismissal of his petition for postconviction relief.

¶ 3 Originally, we affirmed the summary dismissal because a statement by an alibi witness, Tiffany Steele, lacked a notarization and hence was not a supporting "affidavit" (725 ILCS 5/122-2 (West 2012)). *People v. Hemingway*, 2014 IL App (4th) 121039, ¶¶ 2, 26. In the exercise of its supervisory authority, however, the supreme court has directed us to vacate our judgment and to reconsider the matter in light of *People v. Allen*, 2015 IL 113135, to determine

if a different result is warranted. *People v. Hemingway*, No. 118140 (Ill. Sept. 30, 2015) (nonprecedential supervisory order on denial of leave to appeal).

¶ 4 Accordingly, we vacate our judgment in *Hemingway*, 2014 IL App (4th) 121039, and on reconsideration in light of *Allen*, we conclude that a different result is indeed warranted. We reach this conclusion for two reasons. First, under *Allen*, the lack of a notarization on a purported supporting affidavit does not justify the summary dismissal of a postconviction petition. See *Allen*, 2015 IL 113135, ¶ 34. Second, it is "arguable" that defense counsel should have called Steele as an alibi witness, and it is "arguable" that, had he done so, there would have been a reasonable probability of a different outcome. *People v. Hodges*, 234 Ill. 2d 1, 17 (2009). Therefore, we reverse the trial court's judgment, and we remand this case for further proceedings.

¶ 5 I. BACKGROUND

¶ 6 An armed robbery occurred at approximately 10:55 a.m. on August 17, 2009, just outside the McDonald's restaurant on North Mattis Avenue in Champaign. Every day, the cash receipts from the night before had to be taken to the bank. A floor supervisor, Terri Herbst, was walking to her car, carrying the cash in a canvas bag, when a young man approached her on foot and demanded that she hand over the bag. When she refused, he hit her on the head with a pistol and ran away with the bag.

¶ 7 In the jury trial, two witnesses, Jason Townsend and Sarah Adamson, testified that they recognized defendant as the robber.

¶ 8 There was quite a lot of other, perhaps more compelling, evidence against defendant. For one thing, the police found $1,900 in his pants pockets, divided up and rubber-banded in separate denominations, just the way the restaurant manager, Marius Chirila, was accustomed to prepare the cash receipts for deposit. Also, half an hour or so after the robbery,

the police saw defendant get out of a car that witnesses had seen idling near the McDonald's about the time of the robbery (one witness, Peter Zafer, had even written down the license plate number). And in the trunk of the car, the police found a black semiautomatic pistol, which met the description of the pistol the robber had used. Also, defendant confessed to the police that he was the robber, although, in the jury trial, he recanted his confession.

¶ 9 Obviously, this is a rather cursory recitation of the evidence. But because the standard for surviving the first stage of a postconviction proceeding is so generous, a more detailed recitation of the evidence is unnecessary at this point. We have recounted just enough of the evidence to set the stage for defendant's postconviction petition.

¶ 10 On appeal, defendant argues that two claims in his petition cannot fairly be characterized as "frivolous or *** patently without merit": (1) trial counsel rendered ineffective assistance by failing to call Steele as an alibi witness, and (2) counsel on direct appeal rendered ineffective assistance by failing to challenge his prison sentence as too severe. The second claim is fairly self-explanatory. In support of the first claim, defendant attached to his petition a statement signed by Steele on July 17, 2012, in which she alleged as follows:

> "I, Tiffany, under oath and penalty of perjury, state the following:
>
> 1. My name is Tiffany Steele.
>
> 2. On [M]onday morning of August 17, 20098 [*sic*][,] I left my apartment at 2003 Cynthia Dr.[,] Apt. 104 F, at 10:23 a.m. to go over to [defendant's] apartment at 2009 Cynthia Dr.[,] Apt. 203 G.

3. I usually go hang out with him if he doesn't have to work. [Defendant] was on his porch talking to Direck Green[,] my boyfriend[']s cousin. They were talking about the party he had the night before. So I joined them in the conversation.

4. My boyfriend Anthony came over there to talk with us. [Defendant] had told us he was waiting on Charlie Vogel, [whom] I know as [']Mook[,'] to come pick him and Tesha up. So he could go pay his cell phone bill.

5. I told him that I was waiting for the mail man to come. Mook had c[o]me to [defendant's] apartment. They went in and told Tesha it was time to go. As we were all leaving, my mom text[ed] me at 11:03[,] letting me know the mail man had just c[o]me by. I text[ed] her I was on my way back.

6. I walked [defendant], Tesha, and Mook to Mook's car. An[d] I told them I would see them later.

7. The only time I [saw defendant] leave the apartment complex [was] when Mook pick[ed] him and Tesha up[] after 11:00 a.m.

8. I told [defendant's] Public Defender[,] Amanda [Riess,] that I would testify for him[] to what is stated in this affidavit. I came to every court date[,] an[d] she told me she didn't need me to[] an[d] that I could sit an[d] watch the trial. I was willing and able to testify."

¶ 11 II. ANALYSIS

¶ 12 Whether to call a witness to testify in a trial is a strategic decision, to which we give "wide latitude." *People v. Davis*, 228 Ill. App. 3d 123, 130 (1992). All we require of strategic decisions is that they be "objectively reasonable." *People v. Harris*, 225 Ill. 2d 1, 49 (2007); see also *People v. Caballero*, 126 Ill. 2d 248, 260 (1989).

¶ 13 It is true that some things could be said against calling Steele as a witness. One problem is that she remembered people showing up of whom defendant seemed to have no recollection. She was prepared to testify that while defendant was on the porch, no less than three people stopped by and had a conversation with him, namely, her, Anthony, and Green. In his own testimony, however, defendant mentioned none of those people, although he apparently intended to be detailed in his testimony, such as by testifying that he got dressed and went outside to have a cigarette. Another possible problem is the believability of Steele's statement. How did she know, for example, that, three years ago, on August 17, 2009, she left her apartment at precisely 10:23 a.m.?

¶ 14 On the other hand, something could be said in favor of calling Steele. Her statement does not directly contradict defendant's testimony, and she is indeed an alibi witness. She could place defendant elsewhere at the time of the robbery. And without her testimony, all defendant had was his own uncorroborated testimony, laced with admissions that he had lied to the police. What did he have to lose? We cannot fairly say it is a "fantastic or delusional" argument, or an "indisputably meritless" argument, that trial counsel should have called Steele as an alibi witness. *Hodges*, 234 Ill. 2d at 16-17.

¶ 15 Having reached that conclusion, we need not address the remaining claim in the petition, that appellate counsel on direct appeal rendered ineffective assistance by failing to

challenge the severity of the sentence. There is some question of whether the *pro se* petition can be reasonably interpreted as raising that claim. See 725 ILCS 5/122-2 (West 2012) ("The petition shall *** clearly set forth the respects in which petitioner's constitutional rights were violated."); 725 ILCS 5/122-3 (West 2012) ("Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived," *i.e.*, forfeited.). On remand, the appointed postconviction counsel can raise that claim more explicitly, in an amended petition, if he or she sees fit to do so.

¶ 16 III. CONCLUSION

¶ 17 For the foregoing reasons, we reverse the trial court's judgment, and we remand this case for further proceedings.

¶ 18 Reversed and remanded.