2016 IL App (4th) 140115-U

NO. 4-14-0115

FILED
December 13, 2016
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.	)	Adams County
DAVID R. BENTZ	)	No. 08CF585
Defendant-Appellant.	)	
	)	Honorable
	)	William O. Mays,
	)	Judge Presiding.

PRESIDING JUSTICE KNECHT delivered the judgment of the court.
Justices Turner and Pope concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant stated the gist of a constitutional claim his appellate and trial counsel provided ineffective assistance by failing to argue he was improperly convicted and sentenced for both felony murder and aggravated arson, the predicate felony for the felony-murder conviction.

¶ 2 In December 2013, defendant, David R. Bentz, filed a *pro* se petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2012)). In his petition, defendant alleged he was denied the effective assistance of counsel when trial and appellate counsel failed to argue his convictions and sentences for one count of aggravated arson (720 ILCS 5/20-1.1 (West 2008)) and three counts of felony murder (720 ILCS 5/9-1(a)(3) (West 2008)) violated the prohibition against double jeopardy. The trial court found the petition frivolous and patently without merit and dismissed it.

¶ 3 On appeal, defendant argues the dismissal is erroneous. We reverse and remand.

¶ 4 I. BACKGROUND

¶ 5 In the early morning hours of October 25, 2008, a fire was set in defendant's apartment. Three tenants of the same building died in the fire; a Quincy firefighter was injured. Two days later, defendant was charged with three counts of first degree felony murder (720 ILCS 5/9-1(a)(3) (West 2008)) and two counts of aggravated arson (720 ILCS 5/20-1.1 (West 2008)). Counts I through III specify felony-murder charges for each individual who died in the fire. Count IV alleges defendant committed aggravated arson in that he committed arson damaging a building in which he should have reasonably known individuals were present. Count V alleges defendant committed aggravated arson resulting in an injury to a firefighter in the line of duty.

¶ 6 In March 2009, defendant moved to suppress his confession. At the hearing on the motion, testimony established police detectives Gabriel Vanderbol and Anjanette Stovall investigated the fire. These detectives identified defendant as the prime suspect as the "incendiary" fire originated around 3 a.m. in the apartment defendant shared with his wife, Heather Cole-Bentz, and their daughter. The detectives located and interviewed Heather. They learned Heather secured an order of protection against Bentz on October 23, 2008, mandating Bentz stay away from Heather and her daughter and vacate the apartment. Defendant had been staying with Teresa Lamberson. The officers met with Lamberson, who said defendant showed up early Saturday morning for a brief time, which woke her. Near 6 p.m. that same day, the detectives went to Lamberson's residence to question defendant. The detectives told defendant they would like to question him about the fire. Defendant denied knowing anything about the

fire but voluntarily went to the Quincy police department with the detectives. Defendant was informed he was not under arrest.

¶ 7 The detectives advised defendant of his *Miranda* rights (*Miranda v. Arizona*, 384 U.S. 4361 (1966)) and interviewed him. Defendant denied being in the apartment since being served with the order of protection on October 23. Defendant had vacated the apartment and locked the door with his key when he left. Defendant had the key with him at the time of the interview. Heather had lost her key, which was not labeled.

¶ 8 Defendant told Detective Vanderbol he last saw Heather on Monday, October 20, 2008, when she moved from the apartment into her mother's home. Later, defendant admitted seeing Heather on October 22. On that date, Heather gave defendant a ride to the apartment and told defendant she was filing for divorce on October 24. Defendant became angry and "busted" the passenger-side window of her vehicle by striking it several times with his hand. Defendant admitted fighting with Heather for several months, and he had been criminally charged for throwing a soda can through a window of the residence of Heather's friend after that friend would not allow defendant to enter the residence to talk to Heather. Defendant was "bummed" about the divorce.

¶ 9 During the interview, Detective Vanderbol told defendant about "some fire damage" at his apartment. When asked about his whereabouts on October 24 and 25, defendant stated he borrowed money from his friend, Chris Pendergist, and, around 8:30 p.m. on October 24, he walked from Lamberson's house to a bar, where he drank between 6 and 10 beers. Defendant returned to Lamberson's for pool cues around 9:30 p.m. and returned to the bar, where he stayed until near closing. Defendant was "rather drunk." He walked to Lamberson's

and used her phone to call Pendergist. Defendant then walked to Pendergist's house, where he stayed until around 5 p.m. on October 25, when he returned to Lamberson's.

¶ 10 Detective Vanderbol informed defendant he knew defendant was the only person with a key to the apartment, there was no evidence of a forced entry, and the fire had been set intentionally. Defendant stated he locked the door to the apartment when he left after receiving the restraining order on Thursday, October 23, but he violated the order of protection by returning to the apartment between 8 and 9 p.m. to retrieve some computers and other items. Defendant stated he did not lock the door because his hands were full. Defendant took his computers to Pendergist's house. Defendant denied knowing anything about the fire because he had not been to the apartment since Thursday night.

¶ 11 Defendant asked if he was a suspect. Detective Vanderbol said that he was. Defendant initially stated Pendergist was with him when he went to the apartment on Thursday night and saw defendant leave without locking the door. Then, after Detective Vanderbol said he would interview Pendergist, defendant reported Pendergist drove him to the apartment but did not go inside with him. Defendant told Pendergist, when he returned, he left the door unlocked.

¶ 12 At this point in the interview, defendant began asking questions about having an attorney present. Detective Vanderbol left the interview room. Before he did so, the detective told defendant he could not leave. At this point, Detective Vanderbol considered defendant in custody. The interview recommenced. The rest of the interview is not relevant to this appeal.

¶ 13 The trial court denied the motion to suppress the statements made prior to invoking right to his attorney and the trial ensued. The jury found defendant guilty of all charges. The trial court sentenced defendant to three terms of natural life in prison for the

murders and to 30 years in prison for each count of aggravated arson. The sentences were to run concurrently.

¶ 14 On direct appeal, defendant asserted two claims. Defendant argued (1) his statements should have been suppressed because he had invoked his right to counsel, and (2) trial counsel was ineffective for failing to invoke the marital privilege to prevent defendant's wife from testifying against him. *People v. Bentz*, 2012 IL App (4th) 100119-U, ¶¶ 2-3. This court affirmed. *Id.* ¶ 4.

¶ 15 In December 2013, defendant filed his petition for postconviction relief. Defendant asserted seven claims, two of which are pursued on appeal: trial and appellate counsel were ineffective for failing to argue his (1) sentences for both aggravated-arson counts constitute double jeopardy and (2) arrest was illegal as probable cause did not exist until after his arrest.

¶ 16 In January 2013, the trial court dismissed his petition as frivolous and patently without merit. The court found the petition failed to allege any violation of defendant's constitutional rights and the allegations were forfeited or barred by *res judicata* or were matters of trial strategy.

¶ 17 On appeal of the dismissal, this court concluded the trial court properly found defendant failed to state the gist of a constitutional claim counsel was ineffective for failing to argue his arrest was not supported by probable cause. We further found defendant's conviction and sentence for count IV, aggravated arson, violated the prohibition against double jeopardy. Following *People v. Brunt*, 332 Ill. App. 3d 974, 979, 775 N.E.2d 11, 16 (2002), we vacated the aggravated-arson conviction, the predicate offense for a felony-murder conviction, and affirmed the dismissal of defendant's postconviction petition.

¶ 18 By supervisory order, the Illinois Supreme Court vacated our initial decision. The court directed us to reconsider the result in light of its decision in *People v. Cathey*, 2012 IL 111746, 965 N.E.2d 1109.

¶ 19 II. ANALYSIS

¶ 20 The Act sets forth a method by which criminally sentenced individuals may assert their convictions resulted from a substantial denial of their constitutional rights. *People v. Hodges*, 234 Ill. 2d 1, 9, 912 N.E.2d 1204, 1208 (2009). An individual commences proceedings under the Act by filing a petition in the circuit court in which the original proceeding was held. *Id.* In postconviction proceedings, a petitioner must "clearly set forth the respects in which the petitioner's constitutional rights were violated." 725 ILCS 5/122-2 (West 2012). At this stage, the first stage, a defendant need only present a limited amount of detail (*People v. Torres*, 228 Ill. 2d 382, 394, 888 N.E.2d 91, 100 (2008)), alleging only sufficient facts to make a constitutional claim that is arguable (*Hodges*, 234 Ill. 2d at 9, 912 N.E.2d at 1208). A trial court shall, however, dismiss any petition it determines is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2012). We review *de novo* first-stage dismissals. See *People v. Couch*, 2012 IL App (4th) 100234, ¶ 13, 970 N.E.2d 1270.

¶ 21 The State argues defendant's petition was properly dismissed because defendant failed to comply with section 122-2 (725 ILCS 5/122-2 (West 2012)) by not attaching affidavits, documents, or other evidence to support the allegations, or by not providing an explanation for their absence. The State maintains this fact alone supports the dismissal.

¶ 22 The State's argument fails. The record shows defendant complied with section 122-2. In a statement "subscribed and sworn" before a notary public, defendant asserted:

"Exhibit[s] are not attached and/or this petition is not detailed [due] to correctional officer's [*sic*] at Menard confiscating all of defendant's legal materials for this petition."

¶ 23 Turning to defendant's contentions, defendant first argues he was denied the effective assistance of counsel when his counsel at trial and on appeal failed to argue he could be convicted of only one count of aggravated arson. Defendant maintains his two convictions for aggravated arson violate double jeopardy as one serves as the predicate offense for his felony-murder convictions.

¶ 24 Criminal defendants have the constitutional right to the effective assistance of counsel. *People v. Domagala*, 2013 IL 113688, ¶ 36, 987 N.E.2d 767. To plead sufficiently a claim for ineffective assistance of counsel at the first stage, a postconviction petitioner must show it is arguable (1) counsel's representation fell below an objective standard of reasonableness; and (2) absent the error, there is a reasonable probability the proceeding's outcome would have been different. See *Hodges*, 234 Ill. 2d at 17, 912 N.E.2d at 1212 (setting forth the minimum pleading requirements at the first stage of proceedings under the Act); *People v. Daugherty*, 204 Ill. App. 3d 614, 618, 561 N.E.2d 1384, 1387 (1990).

¶ 25 Multiple convictions are improper if based on lesser-included offenses. *People v. Bailey*, 364 Ill. App. 3d 404, 410, 846 N.E.2d 147, 152 (2006). When a defendant is found guilty of both felony murder and its underlying predicate offense, the underlying offense is a lesser-included offense. *Id.* A separate conviction and sentence for the lesser offense cannot stand. *Id.* Here, count IV is the lesser-included offense for defendant's felony-murder convictions. The failure of trial and appellate counsel to raise the issue falls below an objective standard of reasonableness.

¶ 26 The State maintains defendant is not entitled to relief because he cannot prove prejudice, the second prerequisite of an ineffective-assistance-of-counsel claim. The State emphasizes defendant was sentenced to three terms of natural life and the relief he seeks, the vacatur of one concurrent 30-year prison term, will have no effect on the sentence he serves or any later sentences he may receive.

¶ 27 We disagree with the State's assertion. While the second part of the test is referred to as the prejudice prong (see, *e.g.*, *Domagala*, 2013 IL 113688, ¶ 36, 987 N.E.2d 767), the analysis of that part of the test does not turn on whether the defendant will suffer real-life consequences as a result of the error. The State cites no case so holding. The test requires this court to consider whether the outcome of the sentencing hearing would have been different absent counsel's error (see *Daugherty*, 204 Ill. App. 3d at 618, 561 N.E.2d at 1387) or whether "the deficient performance so prejudiced the defense as to deny the defendant a fair sentencing hearing" (*People v. Stanley*, 246 Ill. App. 3d 393, 403, 615 N.E.2d 1352, 1360 (1993)). Here, the record plainly establishes, had counsel at trial or on direct appeal raised this issue, the outcome would have been different, and defendant was denied a fair sentencing hearing as he was twice sentenced for the same crime.

¶ 28 Defendant's conviction and sentence violate the prohibition against double jeopardy. Defendant has stated the gist of a constitutional claim he was denied the effective assistance of counsel when his trial and appellate counsel failed to assert that claim. The trial court erred in dismissing defendant's postconviction petition.

¶ 29 Because we have found defendant asserted the gist of a constitutional claim as to his first argument, we need not address his ineffective-assistance claim regarding his arrest.

"Partial summary dismissals are not permitted under the [Act]." *Cathey*, 2012 IL 111746, ¶ 34, 965 N.E.2d 1109. We therefore remand for the appointment of counsel and further proceedings under the Act.

¶ 30 III. CONCLUSION

¶ 31 We reverse the trial court's dismissal of the petition for postconviction relief and remand for further proceedings.

¶ 32 Reversed and remanded.