2016 IL App (4th) 140281-U

NO. 4-14-0281

FILED
March 11, 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.	)	Champaign County
ANDTRICE L. VAUGHN,	)	No. 11CF700
Defendant-Appellant.	)	
	)	Honorable
	)	Heidi N. Ladd,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Harris and Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed defendant's ineffective assistance of counsel claim at the first stage of postconviction proceedings.

¶ 2 In May 2011, the State charged defendant, Andtrice Vaughn, with residential burglary (count I) (720 ILCS 5/19-3 (West 2010)) and aggravated unlawful restraint (count II) (720 ILCS 5/10-3.1(a) (West 2010)), alleging he broke into V.H.'s apartment and detained her at knifepoint. Immediately before trial, the State learned V.H. had sex with defendant during the incident. The State informally agreed not to address this issue at trial. Defense counsel introduced the issue on cross-examination, leading to an in-depth inquiry into the sexual encounter. In August 2011, the jury found defendant guilty on both counts. In October 2011, the trial court sentenced him to 15 years in prison.

¶ 3 Defendant filed a direct appeal challenging (1) the sufficiency of the evidence to sustain a residential burglary conviction and (2) fines imposed at trial. The appellate court

affirmed the trial court on the sufficiency of the evidence and remanded to reimpose fines. *People v. Vaughn*, 2013 IL App (4th) 110925-U (unpublished order pursuant to Supreme Court Rule 23). In December 2013, defendant filed a postconviction petition alleging, among other arguments, ineffective assistance of trial counsel. In March 2014, the trial court dismissed defendant's petition. This appeal followed.

¶ 4 I. BACKGROUND

¶ 5 On May 5, 2011, defendant broke into V.H.'s apartment, without permission, and held her at knifepoint. He was charged with residential burglary (count I) (720 ILCS 5/19-3 (West 2010)) while intending to commit the felony of aggravated battery (720 ILCS 5/12-3.05 (West 2010)). He was also charged with aggravated unlawful restraint (count II) (720 ILCS 5/10-3.1(a) (West 2010)).

¶ 6 On August 16, 2011, immediately before opening statements at the jury trial, the State disclosed a recent conversation it had with V.H. That morning, V.H. told the State she had nonconsensual sexual intercourse with defendant during the alleged crime. V.H. did not disclose this to the police. Defendant disclosed the event to police but maintained it was consensual. The State informally promised not to discuss the parties' sexual encounter during direct examination to avoid an unfair surprise to defendant. The State offered to allow defendant time to explore the issue.

¶ 7 Defendant disagreed with his trial counsel on how to address the sexual encounter. Defense counsel declined to make a motion *in limine* on the issue because she believed it was a potential strategic opportunity. Defense counsel agreed to proceed with the trial despite this new information, indicating she knew this issue might arise, based on her knowledge of the case. Neither party addressed the sexual encounter in opening statements.

¶ 8 V.H. testified she began dating defendant in May 2010. They dated sporadically

until May 5, 2011, when V.H. ended her relationship with defendant. That night, V.H. went out for drinks with friends, returning home around 12:30 in the morning. When she returned home, defendant was in her apartment. Defendant never had a key or permission to enter V.H.'s apartment without her being present.

¶ 9 Defendant gained entry by breaking the glass patio door to the apartment. When V.H. first saw him, defendant was wielding a knife. Drunk and distraught over their breakup, defendant threatened to kill V.H. and then kill himself. The entire episode lasted approximately three hours. V.H. did not feel free to leave at any point. Defendant eventually decided he could not kill V.H. and encouraged her to call the police. He never physically harmed V.H. with the knife but did cut her jacket with it.

¶ 10 V.H. called the police and waited for them outside the front door of her apartment. While waiting for the police, she claimed defendant cut her furniture and bedsheets, poured bleach on her clothes, cut the cords to her printer and computer, and smeared blood on her walls. V.H. never testified to any sexual encounter during her direct examination.

¶ 11 The trial court called a recess to allow defendant to prepare for cross-examination in light of the sexual encounter between V.H. and defendant. Defendant spoke with his attorney during this time, but the record is silent as to what was discussed.

¶ 12 At the end of V.H.'s cross-examination, defense counsel asked, "did you and [defendant] have sex that night?" V.H. responded they did. Once defense counsel elicited this testimony, the State went into further detail on redirect examination. Defendant told V.H. to remove her clothes. He threatened to kill her if she did not. Defendant was holding the knife while they had sex. V.H. did not physically resist but repeatedly said "no." The State referred to V.H.'s experience as "rape" in subsequent questions. Defense counsel chose not to re-cross-examine V.H.

¶ 13 Sergeant Joseph Ketchum and Officers Brian Karbach, Jeff Creel, and Bradley Krauel were the police officers dispatched to the scene of the crime. Karbach corroborated the damage and blood smeared in V.H.'s apartment. Ketchem and Creel observed defendant wielding the knife. Defendant pleaded with the officers to shoot and kill him. Creel shot defendant with a "nonlethal shotgun" (beanbag rounds) and the officers ultimately detained him.

¶ 14 Krauel later interviewed defendant at the hospital. Defendant gave a statement regarding his version of events. After breaking up with V.H., defendant spent the rest of the day drinking alcohol and decided to kill V.H. and himself. He broke into V.H.'s apartment and continued drinking. V.H. was not home. Defendant damaged some of V.H.'s furniture while waiting for her to return. He found a knife in the kitchen. Defendant recounted his interaction with V.H. when she arrived home. Specifically, he told Krauel about his sexual interaction with V.H. Defendant believed it was consensual. It was unclear from defendant's explanation if he had the knife while having sex with V.H. Afterward, defendant decided he could not kill V.H. and encouraged her to call the police, hoping they would kill him. Krauel did not tape the interview or take notes but wrote a report 20 minutes after it occurred. His report on defendant's statement was made before Krauel knew about V.H.'s statement to police or any information from other officers.

¶ 15 In closing argument, the State, without objection, discouraged the jury from considering the sexual encounter because defendant was not charged with sexual assault. Defense counsel argued, in closing argument, V.H. was not credible because she omitted the sexual encounter in her statement to police. Defense counsel further stated, "Our argument, obviously, is the fact that [the sexual encounter] was consensual." At the close of the State's evidence and the close of trial, defense counsel moved for a directed verdict. The trial court denied the motion both times. The jury found defendant guilty on both counts. The court

sentenced him to 15 years in prison.

¶ 16 Defendant filed a direct appeal to this court challenging (1) the sufficiency of the evidence of residential burglary and (2) fines and fees imposed at trial, and this court affirmed. *Vaughn*, 2013 IL App (4th) 110925-U (unpublished order filed pursuant to Supreme Court Rule 23).

¶ 17 In December 2013, defendant filed a postconviction petition alleging, among other claims, ineffective assistance of trial counsel. Specifically, defendant complained his attorney failed to conduct re-cross-examination of V.H. and failed to object to the State's remarks during closing argument about the "sexual assault." Defendant also believed Officer Krauel's testimony regarding defendant's statements in the hospital (1) was incredible and (2) failed to establish defendant's intent to commit aggravated battery. Defendant did not challenge Krauel's testimony regarding defendant's rendition of his sexual encounter with V.H. In March 2014, the trial court dismissed the petition, finding it frivolous and without merit.

¶ 18 II. ANALYSIS

¶ 19 On appeal, defendant argues (1) trial counsel was ineffective because she introduced V.H.'s uncharged sexual assault at trial, and (2) his claim was not forfeited on appeal because appellate counsel was ineffective for failing to raise ineffective assistance of trial counsel on direct appeal.

¶ 20 A. Ineffective Assistance of Trial Counsel

¶ 21 On appeal, defendant argues he presented the gist of a constitutional claim and should be allowed to proceed in the postconviction process. We disagree. The Post-Conviction Hearing Act (Act) permits a defendant to argue the denial of constitutional rights resulting in his conviction. 725 ILCS 5/122-1(a)(1) (West 2012). A postconviction petition proceeds in three stages. At the first stage, the trial court reviews defendant's petition and determines whether the

claim is frivolous and patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2012); *People v. Gaultney*, 174 Ill. 2d 410, 418, 675 N.E.2d 102, 106 (1996). Dismissal at the first stage is reviewed *de novo*. *People v. Harris*, 224 Ill. 2d 115, 123, 862 N.E.2d 960, 966 (2007).

¶ 22 In his *pro se* postconviction petition, defendant makes several arguments regarding his trial attorney's actions but never overtly challenges the introduction of his sexual encounter with V.H. The State argues defendant forfeited this issue on appeal by failing to raise it in his initial postconviction petition. We agree. At the first stage of a *pro se* postconviction proceeding, we are required to liberally construe defendant's claim. *People v. Hodges*, 234 Ill. 2d 1, 21, 912 N.E.2d 1204, 1214 (2009). Any issue not raised in defendant's postconviction petition is forfeited on appeal. *People v. Little*, 335 Ill. App. 3d 1046, 1055, 782 N.E.2d 957, 965 (2003). Defendant's petition selectively challenges evidence surrounding the sexual encounter. He challenges his trial attorney's failure to object to the State's closing argument, re-cross-examine V.H., and exclude Officer Krauel's testimony offered to show defendant's intent to commit aggravated battery prior to committing burglary. Defendant does not take issue with his trial attorney's introduction of the sexual encounter or her closing argument, which characterized the encounter as consensual. Even when liberally construed, defendant does not appear to challenge the admission of the sexual encounter. Introduction of the sexual encounter into evidence was not raised in the postconviction petition and is forfeited on appeal.

¶ 23 Even if the claim was not forfeited, the petition fails to state the gist of a constitutional claim. A claim will not be dismissed at the first stage as long as it presents "the gist of a constitutional claim." *Gaultney*, 174 Ill. 2d at 418, 675 N.E.2d at 106. The first stage is a low threshold to meet. *Id*. Legal authority and legal citations are not required. *Id.* Ineffective assistance is a constitutional claim arising from the sixth amendment of the United States Constitution (U.S. Const., amend. VI). The sixth amendment provides defendants the right to

counsel, which is interpreted to mean the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To establish counsel was ineffective, the defendant must show (1) counsel's performance was not objectively reasonable and (2) "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *People v. Enis*, 194 Ill. 2d 361, 376, 743 N.E.2d 1, 11 (2000) (citing *Strickland*, 466 U.S. at 687, 694). In the context of a first-stage postconviction proceeding, ineffective assistance is shown by establishing (1) counsel's performance was arguably objectively unreasonable and (2) defendant was arguably prejudiced. *Hodges*, 234 Ill. 2d at 17, 912 N.E.2d at 1212 .

¶ 24 Defense trial counsel clearly stated, in her closing argument, the purpose of introducing the sexual encounter. She believed it was consensual and served to undermine the credibility of V.H., the State's main witness. She pointed out V.H.'s omission of the encounter and defendant's willingness to admit it occurred, which damaged V.H.'s credibility and bolstered defendant's credibility.

¶ 25 Defendant, on appeal, suggests the introduction was improper because it related to rape, an uncharged offense. However, the introduction of the encounter, from defendant's trial counsel's perspective, does not frame it as a crime at all. It was a consensual encounter offered to undermine V.H.'s credibility and cast doubt on defendant's intent to commit residential burglary and aggravated battery.

¶ 26 Counsel's actions did not result in arguable prejudice. Defendant is prejudiced if, but for counsel's errors, the trial would have turned out differently. *Enis*, 194 Ill. 2d at 376, 743 N.E.2d at 11. At first-stage postconviction proceedings, defendant must show the trial would arguably have turned out differently. *Hodges*, 234 Ill. 2d at 17, 912 N.E.2d at 1212. The outcome at trial would be the same without any discussion of the sexual encounter. Officer Krauel testified to defendant's comments in the hospital, where defendant admitted his intent to

kill V.H. before breaking into her apartment. V.H. independently corroborated defendant's break-in and added she never felt free to leave. Photographs and police testimony further corroborate defendant's mental state, possession of a knife, and the condition of the apartment. In defendant's direct appeal, we found this evidence, without considering the sexual encounter, sufficient to find defendant guilty of residential burglary beyond a reasonable doubt. *Vaughn*, 2013 IL App (4th) 110925-U, ¶ 20. Here, without considering the sexual encounter, we find the outcome would still have been the same. Defendant was not arguably prejudiced from the sexual-encounter evidence.

¶ 27 B. Ineffective Assistance of Appellate Counsel

¶ 28 Defendant argues appellate counsel was ineffective for failing to raise ineffective assistance of trial counsel on direct appeal. We disagree. Appellate counsel is ineffective where counsel's performance (1) was deficient, and (2) prejudiced defendant. *People v. Petrenko*, 237 Ill. 2d 490, 496, 931 N.E.2d 1198, 1203 (2010). "Appellate counsel is not required to raise issues that he reasonably determines are not meritorious." *People v. English*, 2013 IL 112890, ¶ 34, 987 N.E.2d 371. Having determined defendant's postconviction-petition claims are without merit, appellate counsel was not ineffective for failing to raise those same claims on direct appeal.

¶ 29 III. CONCLUSION

¶ 30 We agree with the circuit court and find defendant's postconviction petition frivolous and patently without merit and properly dismissed by the circuit court. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 31 Affirmed.