NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2016 IL App (4th) 141043-U

NO. 4-14-1043

FILED
November 10, 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.	)	McLean County
DANTE JAMES,	)	No. 10CF1102
Defendant-Appellant.	)	
	)	Honorable
	)	Paul G. Lawrence,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Presiding Justice Knecht and Justice Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed the second-stage dismissal of defendant's petition for postconviction relief pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-7 (West 2012)).

¶ 2 In April 2011, defendant had a jury trial on, in pertinent part, a charge of aggravated battery (720 ILCS 5/12-4.2(a)(1) (West 2010)). At the jury instruction conference, defense counsel offered no jury instructions. The jury found defendant guilty of aggravated battery, and the trial court sentenced him to 15 years in prison.

¶ 3 In July 2013, defendant filed a petition for postconviction relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-7 (West 2012)). In it, he claimed that trial counsel was ineffective for failing to tender a jury instruction on the lesser-included offense of reckless conduct (720 ILCS 5/12-5 (West 2010)). The trial court appointed counsel and eventually dismissed the petition at the second stage of postconviction proceedings. Defendant appeals.

We affirm.

¶ 4 I. BACKGROUND

¶ 5 In November 2010, a grand jury indicted defendant on two counts of aggravated battery (720 ILCS 5/12-4.2(a)(1) (West 2010)) and one count each of unlawful use of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2010)) and obstructing justice (720 ILCS 5/31-4(a) (West 2010)). (The State later dismissed the charge of obstructing justice.)

¶ 6 A. Trial

¶ 7 The evidence presented at defendant's April 2011 jury trial established the following facts, which the parties do not dispute. On November 13, 2010, defendant and his girlfriend, Maurkettia Starkey, were staying overnight at a friend's place in Bloomington. That night, defendant found a loaded revolver in the friend's home and decided to play "Russian Roulette" with Starkey.

¶ 8 Defendant removed five of the six bullets from the revolver's cylinder. Starkey told defendant that she did not want to play. Defendant testified that he wanted to merely scare Starkey and did not intend to hurt her. Defendant believed that the remaining bullet was located in a position in the cylinder that would not cause the bullet to fire on the first trigger pull. Defendant lifted the gun and pulled the trigger, shooting Starkey in the jaw. According to defendant's testimony, he mistakenly believed that the cylinder rotated clockwise instead of counterclockwise.

¶ 9 At the jury instruction conference, defense counsel offered no jury instructions. In closing argument, defense counsel argued two alternative theories. First, he argued that someone other than defendant may have fired the shot that hit Starkey. Second, counsel argued that even if defendant did fire the gun, he did not *knowingly* cause Starkey's injury, and, therefore, he lacked

the requisite *mens rea* to be found guilty of aggravated battery.

¶ 10 During deliberations, the jury asked the trial court, "Could we get more information/clarification on definition of *knowingly* caused injury to another person?" (Emphasis in original.) With the parties' agreement, the court responded, "A person acts knowingly with regard to the result of his conduct when he is consciously aware that such result is practically certain to be caused by his conduct." The jury found defendant guilty of all three counts.

¶ 11 At a July 2011 sentencing hearing, the trial court merged the two aggravated battery counts and sentenced defendant to prison sentences of 15 years for aggravated battery and 8 years for unlawful use of a weapon by a felon, with those sentences to be served concurrently.

¶ 12 B. Direct Appeal

¶ 13 In January 2013, this court affirmed defendant's convictions on direct appeal. No issue was raised in that appeal concerning either the effectiveness of trial counsel or the jury instructions. *People v. James*, 2013 IL App (4th) 110868-U.

¶ 14 C. Postconviction Proceedings

¶ 15 In July 2013, defendant filed a petition for postconviction relief under the Act (725 ILCS 5/122-1 to 122-7 (West 2012)). The trial court appointed counsel, who filed an amended petition. In the amended petition, defendant claimed that trial counsel was ineffective for failing to tender a jury instruction on reckless conduct, a lesser-included offense of aggravated battery. In November 2014, the court granted the State's motion to dismiss the amended petition.

¶ 16 This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 Defendant argues that the trial court erred by dismissing his postconviction peti-

tion despite his making a substantial showing of the following constitutional violation: that trial counsel was ineffective for failing to request a jury instruction on the lesser-included offense of reckless conduct (720 ILCS 5/12-5 (2010)). He therefore urges us to reverse the trial court's dismissal of his petition and remand for third-stage postconviction proceedings.

¶ 19 A. The Act

¶ 20 The Act (725 ILCS 5/122-1 to 122-7 (West 2012)) provides a remedy for defendants whose convictions resulted from substantial violations of their constitutional rights. *People v. Edwards*, 197 Ill. 2d 239, 243-44, 757 N.E.2d 442, 445 (2001). The Act sets up a three-stage process for adjudicating postconviction petitions. *People v. Boclair*, 202 Ill. 2d 89, 99, 789 N.E.2d 734, 740 (2002). At the first stage, the trial court shall dismiss the petition if it is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2014). Otherwise, the court appoints counsel, who makes any necessary amendments to the petition. The petition then proceeds to the second stage, where the petition must establish a "substantial showing of a constitutional violation." (Internal quotation marks omitted.) *People v. Tate*, 2012 IL 112214, ¶ 10, 980 N.E.2d 1100. If the petition fails to make a substantial showing, the court should dismiss it on the State's motion. *Id.* Otherwise, the petition proceeds to the third stage for an evidentiary hearing. *Id.*

¶ 21 B. A Criminal Defendant's Right To Decide Whether To Tender a Jury Instruction on a Lesser-Included Offense

¶ 22 In *People v. Medina*, 221 Ill. 2d 394, 403-04, 851 N.E.2d 1220, 1225 (2006), the supreme court reiterated that five decisions ultimately belong to a criminal defendant as opposed to defense counsel: (1) what plea to enter; (2) whether to waive a jury trial; (3) whether to testify on his own behalf; (4) whether to tender a lesser-included offense instruction; and (5) whether to appeal.

¶ 23 In *Medina*, the defendant went to a jury trial on a charge of possession with intent to deliver a controlled substance (720 ILCS 570/401 (West 2002)). *Medina*, 221 Ill. 2d at 397, 851 N.E.2d at 1222. At the jury instruction conference, defense counsel was "adamant" that he did not want an instruction on the lesser-included offense of mere possession. *Id.* at 400, 851 N.E.2d at 1223. The jury received no such instruction and found the defendant guilty of possession with intent to deliver.

¶ 24 On appeal, the defendant argued that his conviction should be reversed because "the record failed to demonstrate that he, personally, made the decision not to tender a lesser-included offense instruction." *Id.* at 401, 851 N.E.2d at 1224. The supreme court disagreed, noting that although "it is the defendant's right to decide whether to *tender* a lesser-included offense instruction," that right differed from the right that defendant was attempting to assert—namely, that "the record must *disclose* that [defendant]—rather than defense counsel—made the ultimate decision not to tender a lesser-included offense instruction." (Emphasis in original.) *Id.* at 402-03, 851 N.E.2d at 1224-25. The court confirmed that a criminal defendant possesses no such right. To the contrary, the court held that where no lesser-included offense instruction is requested by the defendant or defense counsel, "it may be assumed that the decision not to tender was defendant's, after due consultation with counsel." *Id.* at 410, 851 N.E.2d at 1229.

¶ 25 C. This Case

¶ 26 Defendant argues that trial counsel was ineffective for failing to tender a jury instruction on the lesser-included offense of reckless conduct. We disagree.

¶ 27 Defendant misapprehends the relevant law. The decision whether to tender a lesser-included offense instruction belongs to defendant. And, under *Medina*, when a defendant does not offer a lesser-included offense instruction, we will assume that the defendant made that deci-

sion after consulting with counsel. Therefore, defendant's argument on appeal that the decision not to tender was bad trial strategy is inapposite.

¶ 28 We assume that the decision not to tender was made by defendant, not defense counsel. For example, defendant argues that "[c]ounsel was obligated to follow up his [closing] argument with a jury instruction." We disagree. Counsel was obligated to consult with defendant and discuss whether *defendant* wanted defense counsel to tender a lesser-included offense instruction. The decision was defendant's. Defendant cannot now argue that his own decision not to tender an instruction established that counsel was ineffective (without showing more, that is). Again, under *Medina*, we assume—barring some affirmative matter in the record establishing otherwise—that defendant's decision not to tender was the result of "due consultation with counsel." *Id*. Thus, defendant has failed to make a showing that his trial counsel was ineffective.

¶ 29 In his reply brief, defendant attempts to distinguish *Medina* on various grounds. We are not persuaded. The principle of *Medina* applies in full force to proceedings on both direct and collateral review. Defendant argues that the standard should be different in collateral proceedings under the Act, where an evidentiary hearing can be conducted to unearth facts outside the trial record. We are not ruling out the possibility that a defendant could draft a postconviction petition containing a *Medina*-related claim that might mandate an evidentiary hearing. However, in this case, defendant does not allege specific facts that support conducting an evidentiary hearing. Defendant does not claim, for example, that he consulted with his attorney about whether to tender a lesser-included offense instruction and that his attorney provided him with objectively incorrect legal advice. Nor does defendant claim that he wished to have the jury instructed on reckless conduct and defense counsel refused to so request. Such claims might warrant an evidentiary hearing. In this case, defendant makes a claim that was squarely rejected by *Medina*. As

a result, he failed to establish a substantial violation of his constitutional rights.

¶ 30 III. CONCLUSION

¶ 31 For the foregoing reasons, we affirm the trial court's decision.

¶ 32 As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2014).

¶ 33 Affirmed.