2016 IL App (4th) 150687-U

NO. 4-15-0687

FILED
May 26, 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.	)	Macon County
RYAN E. TYUS,	)	No. 07CF1144
Defendant-Appellant.	)	
	)	Honorable
	)	Timothy J. Steadman,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Harris and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed defendant's third-stage postconviction petition, where defendant argued that appellate counsel was ineffective for failing to argue that the evidence was insufficient to prove him guilty beyond a reasonable doubt.

¶ 2 After an August 2009 trial, the jury found defendant, Ryan E. Tyus, guilty of controlled substance trafficking and criminal drug conspiracy. The trial court later sentenced him to 25 years in prison. This court affirmed the conviction and sentence on direct appeal. In October 2012, defendant *pro se* filed a petition for postconviction relief pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-7 (West 2012)). In his petition, defendant argued that appellate counsel was ineffective for failing to argue that the evidence was insufficient to prove defendant guilty beyond a reasonable doubt. In support, defendant argued that the testimony of the forensic chemist did not establish that the chemist tested two bags of powder separately to determine that each contained a substance containing cocaine. The trial court denied the petition

after an evidentiary hearing. We affirm.

¶ 3 I. BACKGROUND

¶ 4 A. The Initial Proceedings and Direct Appeal

¶ 5 In August 2007, the State charged defendant with (1) controlled substance trafficking (100 or more but less than 400 grams of a substance containing cocaine) (720 ILCS 570/401.1 (West 2006)) and (2) criminal drug conspiracy (100 or more but less than 400 grams of a substance containing cocaine) (720 ILCS 570/405.1 (West 2006)). The charges resulted from drug interdiction officers' intercepting a package containing two bags of cocaine sent from Los Angeles, California, to a residence in Decatur, Illinois. A jury later convicted defendant of both counts, and the trial court sentenced him to 25 years in prison. We affirmed defendant's conviction and sentence on direct appeal. *People v. Tyus*, 2011 IL App (4th) 100168, 960 N.E.2d 624.

¶ 6 B. The Postconviction Proceedings

¶ 7 1. *First Stage*

¶ 8 In October 2012, defendant *pro se* filed a petition for postconviction relief pursuant to the Act. Defendant argued, in pertinent part, that appellate counsel provided ineffective assistance by failing to argue that the evidence was insufficient to prove defendant guilty beyond a reasonable doubt. Defendant claimed that the evidence was insufficient because the State failed to prove that both bags of cocaine were *separately* tested for cocaine. Instead, defendant claimed that the cocaine from the bags was commingled before being tested.

¶ 9 In December 2012, the trial court summarily dismissed defendant's postconviction petition. Defendant appealed, and in August 2014 we reversed the trial court's judgment and remanded for further postconviction proceedings. *People v. Tyus*, 2014 IL App (4th) 130139-U.

We held that defendant's petition stated the gist of a claim of ineffective assistance of trial counsel. *Id.* ¶¶ 33-35. We expressed no opinion as to the merits of defendant's claim of ineffective assistance of appellate counsel. *Id.* ¶ 40.

¶ 10 2. *Second Stage*

¶ 11 On remand, the trial court appointed counsel, who filed an amended postconviction petition, adopting the claims from defendant's *pro se* petition. In response, the State filed a motion to dismiss, which the court later denied.

¶ 12 3. *Third Stage*

¶ 13 In August 2015, the trial court conducted an evidentiary hearing on the issues raised in defendant's amended postconviction petition. We limit our discussion of that hearing to the evidence relating to defendant's claim that appellate counsel was ineffective for failing to argue that the evidence was insufficient.

¶ 14 a. Relevant Evidence From Defendant's Jury Trial

¶ 15 Decatur police officer Steve Young testified that in August 2007, police obtained a warrant to search a suspicious package destined for a residence in Decatur, Illinois. Inside the package, police found a comforter, inside of which was a cylindrical, Saran-wrapped object coated in axel grease. Wrapped inside the Saran Wrap was a clear plastic, vacuum-sealed bag. Inside the vacuum-sealed bag were two bags—"a little larger than sandwich style bags"—each of which contained a white, powdery substance. Young testified that he emptied the contents of the two sandwich bags into two separate evidence bags, which he then sealed. He then placed those two evidence bags inside a larger evidence bag, which he also sealed. Young identified State's exhibit No. 6 as the larger evidence bag that contained the two smaller evidence bags of cocaine.

¶ 16 Kristin Stiefvater testified that she was employed as a drug chemist with the Illi-

nois State Police crime lab. She identified four exhibits, including State's exhibit No. 6, and stated that she had received them all from the Decatur police department in November 2007. The following exchange occurred between the State and Stiefvater about how Stiefvater weighed the contents of the various exhibits:

> "Q. [The State:] Did you weigh the contents of the these [*sic*] exhibits?
>
> A. [Stiefvater:] Yes, I did.
>
> Q. And how did you weigh the contents of the exhibits?
>
> A. I weighed the contents on a digital balance. What I do is I take a clean weigh boat, I zero the balance and I then empty the contents of the package into that clean weigh boat and record the weight."

To test the identity of the exhibits, Stiefvater testified, she performed two separate tests "on each of the items"—a color test and a mass spectrometry test. The following exchange occurred about the opinion Stiefvater reached about exhibit No. 6:

> "Q. [The State:] Based upon the testing you conducted and your expertise starting with People's Exhibit Number 6 were you able to form an opinion to [a] reasonable degree of scientific certainty as to the weight and identity of the substance in People's Exhibit Number 6?
>
> A. [Stiefvater:] People's Exhibit Number 6 contains 246.8 grams of white powder which was contained in two separate plastic bags and those contained cocaine."

¶ 17 b. The Trial Court's Decision

¶ 18 After the evidentiary hearing, the trial court denied relief on all the claims in defendant's amended postconviction petition.

¶ 19 This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 Defendant argues that the trial court should have granted relief on his postconviction claim that appellate counsel was ineffective. We disagree.

¶ 22 A. The Post-Conviction Hearing Act and the Standard of Review

¶ 23 The Act provides a multistage process by which persons under criminal sentence can assert that their convictions were the result of a substantial denial of their constitutional rights. *People v. Tate*, 2012 IL 112214, ¶ 8, 980 N.E.2d 1100. At the first stage, the trial court takes the defendant's factual allegations as true and determines whether the petition is frivolous or patently without merit. *People v. Hodges*, 234 Ill. 2d 1, 10, 912 N.E.2d 1204, 1208-09 (2009). If the court does not dismiss the petition as frivolous or patently without merit, the petition advances to the second stage. 725 ILCS 5/122-4 (West 2012). At the second stage, counsel may be appointed to file an amended petition. *Id.* The State then has the opportunity to respond by filling a motion to dismiss or an answer. 725 ILCS 5/122-5 (West 2012).

¶ 24 If the trial court denies the State's second-stage motion to dismiss, the proceedings advance to the third stage, in which an evidentiary hearing is conducted. 725 ILCS 5/122-6 (West 2012). After the hearing, the court determines whether the defendant has established a substantial denial of his constitutional rights.

¶ 25 Defendant acknowledges that, generally, we review a third-stage postconviction judgment under the manifest-weight-of-the-evidence standard. However, defendant argues that

de novo review is appropriate in this case because the evidence is not contested and the issue is one of law. We need not resolve this issue because, under either standard of review, we would affirm the trial court.

¶ 26 B. Ineffective Assistance of Counsel

¶ 27 In his amended postconviction petition, defendant argued that appellate counsel was ineffective for failing to argue on appeal that the evidence was insufficient to prove him guilty beyond a reasonable doubt.

¶ 28 When a defendant raises an ineffective-assistance-of-counsel claim, he must show (1) that counsel's alleged error was objectively unreasonable and (2) a reasonable probability that, but for the error, the results of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). Appellate counsel is not required to raise every conceivable issue on appeal. *People v. West*, 187 Ill. 2d 418, 435, 719 N.E.2d 664, 674 (1999). That is, appellate counsel does not err by refraining to raise issues "which, in his or her judgment, are without merit, unless counsel's appraisal of the merits is patently wrong." *Id.* at 435, 719 N.E. 2d at 674-75. Likewise, unless the underlying issue is meritorious, a defendant cannot establish prejudice for counsel's failure to raise the issue on appeal. *Id.* at 435, 719 N.E.2d at 675.

¶ 29 Therefore, to determine whether appellate counsel provided ineffective assistance, we determine whether the sufficiency-of-the-evidence claim would have been meritorious on direct appeal.

¶ 30 C. Sufficiency of the Evidence

¶ 31 Defendant argues that the evidence was insufficient to prove him guilty beyond a reasonable doubt of trafficking more than 100 but less than 400 grams of a substance containing cocaine. According to defendant, the State provided insufficient evidence to prove that

Stiefvater *separately* tested the contents of the two bags for cocaine before commingling and weighing their contents.

¶ 32 1. *Sufficiency of the Evidence Generally*

¶ 33 When confronted with a challenge to the sufficiency of the evidence, this court considers whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *People v. Wheeler*, 226 Ill. 2d 92, 114, 871 N.E.2d 728, 740 (2007). The trier of fact has the responsibility to resolve conflicts in the evidence and to draw reasonable inferences from the facts. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224, 920 N.E.2d 233, 230 (2009). A conviction will be reversed where the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of the defendant's guilt. *Wheeler*, 226 Ill. 2d at 115, 871 N.E.2d at 740.

¶ 34 2. *The Weight of the Controlled Substance Is an Essential Element of Drug Trafficking*

¶ 35 The offense of drug trafficking depends on the amount of controlled substance one is found to possess. 720 ILCS 570/401.1(b) (West 2006). When a defendant is charged with trafficking a specific amount of a controlled substance, and a lesser-included offense exists for trafficking a smaller amount, the weight of the controlled substance is an essential element of the crime and must be proved beyond a reasonable doubt. See *People v. Jones*, 174 Ill. 2d 427, 428-29, 675 N.E. 2d 99, 100 (1996) (referencing the offense of possession of a controlled substance with intent to deliver). In this case, a lesser-included offense existed for trafficking 15 or more but less than 100 grams of a controlled substance. See 720 ILCS 570/401(a)(1)(A) (West 2006). Therefore, the weight of the cocaine in this case was an essential element of the offense.

¶ 36 When separate packages of a substance are seized, a sample from each package must be tested to determine whether it contains a controlled substance. *People v. Harden*, 2011

IL App (1st) 092309, ¶ 40, 952 N.E.2d 132. (An exception to that rule occurs when the separate packages are sufficiently homogeneous (*Jones*, 174 Ill. 2d at 429, 675 N.E.2d at 100), but the State does not argue that that exception applies in this case.) Commingling the contents of separate packages prior to testing renders the test results insufficient to prove the weight element beyond a reasonable doubt. *Id.*

¶ 37 3. *The Evidence in This Case*

¶ 38 Defendant argues that Stiefvater's testimony established that the combined weight of the two packages of cocaine in this case was 246.8 grams but failed to establish that she tested the contents of the packages individually before commingling and weighing them. As a result, defendant claims, the evidence was insufficient to prove him guilty beyond a reasonable doubt. We disagree.

¶ 39 The cases that defendant cites in support of his argument are inapposite. For instance, in *Jones*, 174 Ill. 2d 427, 675 N.E.2d 99, the evidence was insufficient where defendant was charged based on the weight of five packages although only two of those packages were tested and shown to contain a controlled substance. Similarly, in *People v. Clinton*, 397 Ill. App. 3d 215, 922 N.E.2d 1118 (2009), the testimony established that the forensic chemist commingled six packets of powder before weighing the comingled substance as a whole and testing a sample of it to determine that it contained heroin. Likewise, in *People v. Coleman*, 2015 IL App (4th) 131045, 25 N.E.3d 82, the evidence established that the chemist had improperly commingled substances before weighing and testing them. *Jones*, *Clinton*, and *Coleman* are distinguishable because the testimony in those cases clearly established that the chemist had improperly commingled the substances before testing their weight.

¶ 40 In this case, unlike in *Jones*, *Clinton*, and *Coleman*, the evidence was—at most—

merely unclear as to whether Stiefvater improperly commingled the packages. The relevant issue in this case is the following: what should a court of review do when the evidence was ambiguous as to the propriety of the testing process but the fact finder nonetheless found the defendant guilty?

¶ 41 The situation before us was squarely addressed in *Harden*, 2011 IL App (1st) 092309, 952 N.E.2d 132. In that case, a forensic chemist testified that he was presented with a clear plastic bag containing "20 purple zip bags," each of which contained a chunky substance. *Id.* ¶ 13. The chemist's testimony was ambiguous as to whether he tested the contents of each zip bag individually for the presence of cocaine or whether he first commingled their contents. On appeal, the First District upheld the jury's guilty verdict against a sufficiency-of-the-evidence challenge. The court held that "[w]here the record is ambiguous, *** 'we will not presume that an improper procedure was performed.' " *Id.* ¶ 43 (quoting *People v. Miller*, 218 Ill. App. 3d 668, 673, 578 N.E.2d 1065, 1069 (1991)). The court further held that "[w]here the evidence presented is susceptible to conflicting inferences, 'it is best left to the trier of fact for proper resolution.' " *Id.* (quoting *People v. McDonald*, 168 Ill. 2d 420, 447, 660 N.E.2d 832, 843 (1995), *abrogated on other grounds, People v. Clemons*, 2012 IL 107821, ¶ 40, 968 N.E.2d 1046).

¶ 42 As in *Harden*, the outcome in this case is governed by the standard of review applicable to a sufficiency-of-the-evidence challenge. Under that standard, we consider the evidence in the light most favorable to the State, including any reasonable inferences that the trier of fact could have drawn from the evidence. In this case, the fact finder could have inferred that Stiefvater weighed the two bags of cocaine separately before testing them. When describing the weighing process that she utilized for all of the exhibits, Stiefvater testified that she emptied "the contents of the package" into the weigh boat and recorded the weight. The jury could infer that,

by referencing "the package" instead of "the exhibit," Stiefvater considered each of the two bags of cocaine to be a separate package that she weighed individually. Similarly, Stiefvater testified that she conducted mass spectrometry testing on "each of the *items*," (emphasis added) instead of "each of the exhibits." Her language again implies that she tested each of the bags of cocaine separately.

¶ 43 In addition, when describing her opinion as to the weight and contents of exhibit No. 6, Stiefvater testified that the exhibit contained 246.8 grams of white powder, "which was contained in two separate plastic bags and *those* contained cocaine." (Emphasis added.) Stiefvater's use of the plural "those" implies that she considered the bags separately and, therefore, tested them separately. Although Stiefvater testified to the weight of the exhibit only as a whole, the fact finder could infer that she weighed the contents of the two bags separately and then added the weights to arrive at a measurement for the entire exhibit. Such a method makes sense because the issue at trial was the weight of the exhibit as a whole.

¶ 44 Defendant's claim that Stiefvater commingled the two packages before weighing them is purely speculative. At trial, State's exhibit No. 6 consisted of an evidence bag containing two smaller bags of cocaine. For defendant's theory about commingling to be true, we would have to believe that Stiefvater commingled the two bags of cocaine, weighed and tested them, and then separated them back into the two smaller bags. We find it improbable that Stiefvater would have commingled the contents of the two bags, weighed and tested those commingled contents, and then arbitrarily separated the contents back into separate bags.

¶ 45 We also note that the ambiguity in Stiefvater's testimony could have been addressed by defense counsel at trial during cross-examination. However, defense counsel in this case never did so. Perhaps counsel refrained from questioning Stiefvater about the specifics of

the weighing and testing process because he feared that her answer might "tuckpoint" the State's case if Stiefvater testified that she weighed and tested the cocaine properly. From a strategic point of view, by declining to subject Stiefvater to such cross-examination, defense counsel protected a potentially viable sufficiency-of-the-evidence argument that could have been argued *to the fact finder* during closing argument. Had defendant made that argument to the fact finder, he might have persuaded it to draw inferences in his favor. Instead, defendant argues that appellate counsel should have made those arguments on appeal. However, our standard of review on appeal dictates that we draw those inferences in favor of the State.

¶ 46 Viewing Stiefvater's testimony in the light most favorable to the State, the evidence supports the finding that Stiefvater tested both packages individually for the presence of cocaine. Defendant's claim that the evidence was insufficient would not have been meritorious on appeal, and, therefore, appellate counsel was not ineffective for failing to raise it.

¶ 47 Last, we note again that defendant, when raising the claim that his appellate counsel was ineffective, needed to show a reasonable probability that but for the error, the results of the proceedings would have been different. The *proceeding* mentioned in that sentence is the appeal to this court, so we can speak with some certainty regarding whether, had appellate counsel raised this issue, "the results of the [appeal] would have been different." For the reasons already discussed, this court would have rejected this argument, and the results of defendant's appeal would have been the same.

¶ 48 III. CONCLUSION

¶ 49 For the foregoing reasons, we affirm the trial court's judgment.

¶ 50 Affirmed.