2018 IL App (1st) 153349-U

Fourth Division
August 16, 2018

No. 1-15-3349

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County,
	)	
v.	)	No. 99 CR 26211
	)	
DAN ARCHER,	)	Honorable
	)	Thomas J. Hennelly,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE ELLIS delivered the judgment of the court.
Justices McBride and Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: Affirmed. Circuit court did not err in denying defendant's post-conviction petition. Court's determination at third-stage hearing that defendant failed to show that his guilty plea resulted from trial counsel's misrepresentation of law was not manifestly erroneous.

¶ 2 Following a third-stage evidentiary hearing, the circuit court denied defendant Dan Archer's petition for post-conviction relief. On appeal, defendant contends that the circuit court erred by denying his petition because he made a substantial showing that he was induced to plead

guilty to aggravated kidnapping by his trial counsel's misrepresentation that defendant had no valid defense to the aggravated kidnapping charge. We find no error and affirm.

¶ 3 BACKGROUND

¶ 4 Defendant was charged with aggravated vehicular hijacking, aggravated kidnapping, and possession of a stolen motor vehicle (PSMV), all allegedly committed on or about November 1, 1999. The hijacking charge alleged that defendant took a 1988 Mercury from Alexandro Arriaga (Alexandro) by force or threat of force while armed with a knife. The kidnapping charge alleged that he knowingly carried Yaneli Arriaga (Yaneli) from one place to another by force or threat of force, while armed with a knife, with the intent to secretly confine her against her will.

¶ 5 Plea Conference and Sentencing

¶ 6 On January 16, 2001, the day set for trial, defendant asked the court for new counsel, claiming that his attorney—Assistant Public Defender Koehler—had "done nothing for me." After a brief recess, Koehler told the court that she was working diligently, in that she made "numerous investigations" and was ready for trial. She informed the court that defendant was requesting a plea conference.

¶ 7 During the plea conference, the State described defendant's offenses: On November 1, 1999, Alexandro's wife and son were unloading groceries from the car, and Alexandro was taking his seven-year-old daughter Yaneli out of the car, when defendant approached holding a knife. Defendant grabbed the car keys, shoved Alexandro aside, and entered the car. As defendant was driving away, Alexandro heard his daughter Yaneli screaming in the back seat of the car. Yelling that his daughter was in the car, Alexandro grabbed the fleeing car and held on until defendant slashed his hand with a boxcutter. Defendant crashed the car less than two blocks

from where he took it and fled on foot. He was discovered a short distance away with a head injury, still holding the boxcutter. Yaneli suffered a broken jaw and clavicle in the crash, and Yaneli and her brother were still experiencing nightmares and fear of strangers.

¶ 8 The State argued defendant's criminal background in aggravation: residential burglary, robbery and aggravated battery of an elderly couple, aggravated battery of a child, and "obstruction of justice, felony out of Vermillion County." The State sought an extended sentence based on the fact that Yaneli was under 12 years old. In mitigation, APD Koehler argued that (1) defendant was intoxicated at the time of the offenses and (2) it was unclear that defendant knew Yaneli was in the car when he took it. In addition, Koehler argued that Yaneli's medical records did not show a jaw or other bone fracture and that, although defendant had difficulty finding work after his prior imprisonment, he could now work in his father's plumbing business. Finally, Koehler argued that defendant had diabetes and an alcohol problem. She urged that an extended sentence was inappropriate because it would be equivalent to the sentence for murder.

¶ 9 The State noted that defendant denied an alcohol problem in the pretrial investigation report (PTI) and did not raise an intoxication defense. The State argued that the Arriagas would testify to Yaneli's broken jaw and clavicle.

¶ 10 After noting that the enhancing factor of Yaneli's age was not charged, the court invited defendant to address the court. Defendant denied knowing that Yaneli was in the car, and claimed that the State misrepresented his criminal record. After noting that "convictions are convictions," the court told defendant that it would consider a sentence of 28 years' imprisonment but no less, and it reiterated that defendant's trial would commence immediately if he did not accept the offer.

¶ 11 After a recess, defendant pleaded guilty to aggravated vehicular hijacking and aggravated kidnapping, and a plea hearing was held. The court gave defendant the requisite admonishments, which he said he understood. Ill. S. Ct. R. 402(a) (eff. July 1, 1997); R. 605(d) (eff. Nov. 1, 2000). The court made the requisite determination of voluntariness based on defendant's replies to the court's questions. See Ill. S. Ct. R. 402(b) (eff. July 1, 1997). The parties stipulated that Alexandro would testify consistent with the aforesaid account, and the court found a factual basis for the plea. See Ill. S. Ct. R. 402(c) (eff. July 1, 1997). The court accepted defendant's plea and sentenced him to concurrent prison terms of 28 years. The State *nol prossed* the PSMV charge.

¶ 12 Post-Plea Proceedings

¶ 13 Defendant timely filed a motion to withdraw his plea, claiming in relevant part that Koehler provided ineffective assistance. At the hearing on the motion, defendant testified that Koehler did not object when the State misrepresented his criminal record and did not argue mitigation from the PTI. Defendant specifically denied having a conviction for obstruction of justice. In addition, noting that he had been diagnosed with alcohol abuse, defendant argued that Koehler should have raised an intoxication defense.

¶ 14 On cross-examination, defendant testified that Koehler met with him frequently to discuss the case but they would "just argue" and "she didn't want to hear anything I had to say." Defendant admitted that he requested a plea conference on the day of trial. After the conference, Koehler told him that he faced 45 to 60 years in prison if he did not plead guilty because Koehler "couldn't cross-examine" Yaneli. When pressed on his claim that the State lied in describing his criminal record, defendant admitted that he was convicted of residential burglary, aggravated battery, and robbery but maintained that the State lied because he pled guilty to only residential

burglary. Defendant told Koehler that his father and two employees were witnesses, and provided the employee's names, but Koehler never contacted them. As to intoxication, defendant admitted that Koehler argued his intoxication in mitigation at the plea conference. Likewise, defendant admitted that Koehler argued his diabetes, described in the PTI, and alcohol problem.

¶ 15 Koehler testified that she met with defendant ten times when his case was in court, for about 20-30 minutes each time, to discuss strategy for that court session. She also met him in jail six times for about 45 minutes to an hour, but they could not discuss trial strategy "because [defendant] kept changing his story." For instance, Koehler explained that at one point, defendant said that a prostitute may have participated in the crime. And another time, defendant told Koehler that he committed the offenses but did not have a boxcutter. In addition, although defendant told Koehler that his father and two employees were witnesses, he did not name the employees, so she contacted defendant's father multiple times. However, according to Koehler, defendant's father would not testify on his behalf and was not forthcoming with the employees' information. Nonetheless, Koehler told defendant's father when defendant's trial was scheduled to take place, but he did not show up to court on that day.

¶ 16 Before trial, Koehler told defendant that the State intended to seek a maximum sentence of 60 years' imprisonment. She sent him copies of the aggravated vehicular hijacking and aggravated kidnapping statutes, and the relevant sentencing statutes, so he could see the sentencing he faced. According to Koehler, when she discussed the court's 28-year recommendation with defendant, he was pleased that it was significantly less than the 60-year maximum. Koehler explained that she did not file an intoxication defense because it could be demonstrated only by defendant's testimony, and defendant had told her "from the very get-go"

that he would not testify. Koehler denied telling defendant that she could not cross-examine Yaneli. Rather, she explained to defendant that cross-examining a sympathetic child was often counterproductive to the defendant's defense. As to defendant's prior convictions, he told counsel that he had no obstruction conviction but "told me a lot about those convictions," claiming that many of them were actually his brother's convictions.

¶ 17 Defendant's father testified to telling counsel that he was not a witness, and the employees she asked about were no longer in his employ.

¶ 18 Following arguments, the court denied the motion to withdraw plea. On direct appeal, this court affirmed. *People v. Archer*, No. 1-01-2712 (2002) (unpublished order under Supreme Court Rule 23).

¶ 19 Postconviction Proceedings

¶ 20 On July 8, 2003, defendant filed a *pro se* postconviction petition. In addition to reiterating the claims in his motion to withdraw plea, he claimed that Koehler failed to argue his ineligibility for an extended sentence because the extending factor had not been charged. However, he acknowledged that the trial court recognized that ineligibility.

¶ 21 In November 2008, postconviction counsel was appointed for defendant. In September 2009, defendant, acting through his appointed attorney, filed a supplemental postconviction petition and Rule 651(c) certificate. See Ill. S. Ct. R. 651(c) (eff. July 1, 2017). In relevant part, the supplemental petition alleged that (1) defendant's guilty plea was induced by trial counsel's misrepresentation that he had no defense to aggravated kidnapping and (2) post-plea and direct-appeal counsel were ineffective for not raising that claim earlier.

¶ 22 Attached to the petition was defendant's affidavit. He averred that he did not see anyone in the car when he took it and did not know the girl was in the car. In describing taking the car, he stated that he walked past the car three times before taking it and that he "heard a guy hollering outside the car as I was driving." He explained that he told Koehler that he did not know the girl was in the car, but she told him that it "didn't matter to my defense to aggravated kidnapping whether or not I knew there was a girl inside the car." He further stated that he told Koehler that he wanted to testify, but she told him that she would not do so and he "would definitely lose" if he went to trial. He stated that he accepted the plea because he "was convinced by [counsel's] statements that I had no defense to aggravated kidnapping."

¶ 23 In August 2010, the State filed a motion to dismiss the petition. In June 2011, the court granted the State's motion and dismissed the petition. The court found that some of defendant's claims had been forfeited, some were barred by the doctrine of *res judicata*, and the claims that survived those defenses failed because defendant could not establish objective unreasonableness or prejudice on the remaining ineffectiveness claims.

¶ 24 On appeal from that order, this court held that defendant did not forfeit the claim at issue because he was still allegedly laboring under counsel's misrepresentation when he filed his post-plea motion, and he could not raise on direct appeal a claim not raised in his post-plea motion. *People v. Archer*, 2014 IL App (1st) 111843-U, ¶¶ 24-27. In addition, we held that forfeiture does not affect a claim that post-plea counsel was ineffective for not raising the underlying claim. *Id.*, ¶ 28. We noted that we must accept as true at the second stage defendant's allegation that trial counsel misrepresented whether he had a defense to aggravated kidnapping, as the allegation was not positively rebutted by the record. *Id.*, ¶ 32. We therefore remanded for a third-

stage evidentiary hearing on defendant's claim that Koehler rendered ineffective assistance by misadvising defendant about his lack-of-knowledge defense.

¶ 25 Third-Stage Evidentiary Hearing

¶ 26 On remand, at the evidentiary hearing now under review, defendant testified that he was drunk on the day he took the car, did not know there was a child in the car, and told the police so after his arrest. He also told Koehler that he did not know there was a child in the car. On the day set for trial, Koehler told defendant that she would seek a plea conference because the State would be seeking a sentence up to 60 years at trial. During the conference, defendant told the court that he did not know the child was in the car. After the conference, he asked Koehler what would happen if he testified that he did not know the child was in the car, and she said "that really wasn't a defense to go out there and tell the jury," and that such testimony wouldn't "make a difference at all." He then accepted the plea recommendation because he believed he had no defense at trial.

¶ 27 On cross-examination, defendant denied that he walked past the car three times before he took it. When confronted with his 2009 affidavit—where he said he walked past the car three times—he replied that "I think it was twice." He denied ever hearing a child screaming during the incident. He admitted that in August 2000, he told a doctor that he heard a girl screaming in the back seat of the car, but he denied that he actually heard a child screaming and could not explain why he had said otherwise. He denied that any man yelled or tried to stop the car as he took it. When confronted with his 2009 affidavit that he "heard a guy hollering outside the car as I was driving," he testified that "I'm not sure I heard anything [*sic*] hollering out."

¶ 28 When defendant was arrested within minutes of taking the car, after he crashed it, he was in possession of a boxcutter. After his arrest, he told police that he and a prostitute took the car and that she drove the car. Koehler met defendant at court sometimes but never met him at jail. Defendant told Koehler that he "made *** up" the prostitute and that he had witnesses to his drinking before the incident, including his father and one of his employees. Defendant testified that Koehler told him that he needed witnesses because defendant testifying at trial "wasn't gonna make a difference." Defendant admitted knowing that, had there been a trial, a jury would have heard his criminal history and the State would have sought 60 years' imprisonment. Defendant denied receiving copies of the relevant statutes from Koehler. When asked if he had testified on his motion to withdraw his guilty plea that Koehler told him she would never cross-examine Yaneli, he answered "That's how I interpreted it. If she actually said those words, I'm not sure."

¶ 29 APD Koehler testified at the evidentiary hearing as well. She testified that she met with defendant at every court date and also met with him six times at jail. Defendant gave her several different accounts of the incident, including telling her that he was injured riding in a car with a prostitute who crashed her car. Koehler investigated that story, and also tried to investigate witnesses named by defendant, but defendant's father was uncooperative. Defendant told her at some point that he took the car but did not use a boxcutter. She admitted that she did not recall him changing his account that he did not know the girl was in the car. While she did not recall testifying earlier that she sent defendant copies of the relevant statutes, it was her practice to do so. On the day set for trial, defendant asked for a plea conference. After the conference, defendant told Koehler that he "very much wanted to take the 28-year" recommendation.

¶ 30 Koehler testified that, when discussing possible defenses at trial, she told defendant that his best defense was denying involvement in the offenses and maintaining "that they had the wrong person." She could raise such a defense by intensively cross-examining Alexandro, though she could not aggressively cross-examine Yaneli because "it wouldn't have come across real well to a jury." She denied telling defendant that she would not cross-examine Yaneli. She did not raise an intoxication defense because voluntary intoxication is not a valid defense. She did not argue that defendant did not have a boxcutter because, as none of the witnesses identified by defendant responded to Koehler's inquires, defendant would have to testify to establish that he did not have a boxcutter.

¶ 31 Koehler testified that she told defendant that he could raise a defense of not knowing Yaneli was in the car. She denied telling him that lack of knowledge was not a valid defense to kidnapping. Instead, she told defendant that "it was a bad defense." When asked how she could present such a defense, she replied that defendant "would have had to testify," as she could not introduce his statement to the police by calling the officers as witnesses. However, if defendant testified, the jury would hear his criminal record. Koehler told defendant that it was his right to testify or refrain from testifying but his "violent background" would come into evidence if he testified.

¶ 32 Following closing arguments, the court denied defendant postconviction relief. The court stated that it reviewed the record, including the hearing on the motion to withdraw the plea. The court noted defendant's testimony that trial counsel told him that not knowing the girl was in the car was not a defense to kidnapping, and trial counsel's testimony that she never said that. The court found that credibility was thus at issue. In that regard, the court contrasted trial counsel, "a

member of the bar in good standing," with defendant, a multiple felon who "before me admitted lying to the police" by telling the prostitute story. The court also noted that defendant was now denying that he asked for a plea conference but testified at the plea-withdrawal hearing that he asked for the conference. The court noted that defendant averred in his affidavit to passing the car three times before taking it, but then at the evidentiary hearing denied doing so, before he was confronted with his affidavit. The court found it "ridiculous" that a person could walk past a car three times and not see a seven-year-old child in the back seat. The court generally found defendant incredible in his testimony regarding trial counsel, finding that she "did her obligations as a member of the bar and advised him accordingly." This appeal followed.

¶ 33 ANALYSIS

¶ 34 When a postconviction petition advances to the third stage, the circuit court must determine whether the evidence shows that the defendant is entitled to the relief sought in his petition. *People v. Domagala*, 2013 IL 113688, ¶ 34. The circuit court holds an evidentiary hearing, where the finder of fact determines witness credibility, decides the weight of evidence, and resolves any evidentiary conflicts. *Id*. The defendant bears the burden of showing a substantial violation of his constitutional rights by a preponderance of the evidence. *People v. Williams*, 2017 IL App (1st) 152021, ¶ 22.

¶ 35 When, as here, the circuit court holds an evidentiary hearing and engages in fact-finding and credibility determinations, we will not reverse its decision unless it is manifestly erroneous. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006); *People v. Childress*, 191 Ill. 2d 168, 174 (2000). A ruling is manifestly erroneous if an error is clearly evident, plain, and indisputable. *People v. Ruiz*, 177 Ill.2d 368, 384–85 (1997); *Williams*, 2017 IL App (1st) 152021, ¶ 22.

¶ 36 The right to effective assistance of trial counsel includes guilty-plea proceedings. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985); *People v. Brown*, 2017 IL 121681, ¶¶ 25-26. Claims of ineffective assistance of counsel are governed by the familiar two-prong test set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), whereby a defendant must establish both that counsel's performance fell below an objective standard of reasonableness and that he was prejudiced by counsel's deficient performance. *Hill*, 474 U.S. at 58; *Brown*, 2017 IL 121681, ¶ 25. For purposes of the prejudice prong, a guilty-plea defendant must show a reasonable probability that, absent counsel's errors, he would not have pled guilty and would have insisted on going to trial. *Hill*, 474 U.S. at 59; *Brown*, 2017 IL 121681, ¶ 26. For ineffectiveness claims related to a defendant's trial strategy or chance of acquittal, to establish prejudice, the defendant must have a claim of innocence or a plausible defense. *Brown*, 2017 IL 121681, ¶ 45; *People v. Hall*, 217 Ill. 2d 324, 335-36 (2005)). As the U.S. Supreme Court put it, "where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial." *Hill*, 474 U.S. at 59.

¶ 37 On an ineffectiveness claim, we review counsel's actions under the totality of the circumstances, evaluating those actions from counsel's perspective at the time rather than applying hindsight. *Williams*, 2017 IL 152021, ¶ 37. Defense attorneys are presumed to know the law. *People v. Hotwagner*, 2015 IL App (5th) 130525, ¶ 35. Moreover, defense attorneys are not required to raise losing arguments, and it is strategically sound for counsel to not call a witness whose testimony would be of questionable value or potentially harmful to the defendant's case. *Id*. ¶¶ 39, 48.

¶ 38 A person commits "kidnapping when he or she knowingly *** by force or threat of imminent force carries another from one place to another with intent secretly to confine that other person against his or her will," with the proviso that "[c]onfinement of a child under the age of 13 years *** is against that child's or person's will within the meaning of this Section if that confinement is without the consent of that child's or person's parent or legal guardian." 720 ILCS 5/10-1(a)(2), (b) (West 2014). A person commits aggravated kidnapping by committing kidnapping while armed with a dangerous weapon other than a firearm. 720 ILCS 5/10-2(a)(5) (West 2014). A defendant's intent or knowledge is rarely proved by direct evidence but instead may be inferred from conduct and the surrounding circumstances. *People v. Peterson*, 2017 IL 120331, ¶ 43; *People v. Jones*, 2014 IL App (3d) 121016, ¶ 28.

¶ 39 Here, defendant argues that trial counsel induced him to accept the trial court's plea recommendation by misrepresenting or misapprehending the law. He points to counsel (1) telling him that lack of knowledge that Yaneli was in the car was a "bad defense," when knowledge is an element of aggravated kidnapping, and (2) opining that he would "have" to testify to establish lack of knowledge, when the State has the burden of proof. We do not agree with either point.

¶ 40 To begin, there are reasons, other than misapprehending the law, for Koehler to advise that a defense was "bad" and to opine that a defendant would "have" to testify to establish it. We reiterate that the plausibility of defendant's defense—not merely its *validity* but its *viability*—is properly at issue at the third stage of postconviction proceedings upon his claim that his guilty plea was induced by erroneous advice of counsel. See *Hill*, 474 U.S. at 59; *Brown*, 2017 IL 121681, ¶ 45; *Hall*, 217 Ill. 2d at 335-36.

¶ 41 Consider the evidence that the State was prepared to present: the Arriagas would testify that their young daughter, Yaneli, was screaming in the back seat of the Arriagas' car as defendant was driving it away, and that Alexandro yelled that his daughter was in the car before grabbing hold of the fleeing car. From such evidence, a trier of fact could reasonably infer that defendant knew he was taking Yaneli against her will, confining her by the movement of the car, from the presence of her family to a place unknown to her family and others.

¶ 42 In light of this expected testimony, the circuit court could have reasonably agreed with ADP Koehler that the knowledge defense was unlikely to succeed—legally valid, yes, but not particularly believable. Likewise, the court could have deemed reasonable Koehler's judgment that the only practical way to overcome the Arriagas' testimony and prevail on this long-shot knowledge defense was for defendant to testify, which she strongly advised against him doing, opening him up as it would to impeachment on his extensive criminal background.

¶ 43 Defendant emphasizes that he has consistently denied knowing Yaneli was in the car. But defendant's persistence in maintaining his ignorance was not binding on Koehler. She was not required to mindlessly presume that a jury would believe defendant's version of events, nor was she required to base her entire trial strategy on that hollow presumption.

¶ 44 Insofar as defendant testified that APD Koehler told him that the knowledge defense was legally unavailable to him—as opposed to simply being a bad idea—the trial court quite emphatically stated that it "d[id] not believe anything he said regarding Ms. Koehler" and that defendant was "not worthy of belief." Instead, the court believed Koehler when she denied ever telling him the defense was legally unavailable. We have no basis in the record to overturn that credibility determination. Indeed, the record is sufficient to support the trial court's finding that

defendant lacked credibility. Defendant admitted to giving a false account to police after his arrest; admitted telling a doctor that he heard a girl screaming in the back seat of the car and had no explanation for why he said that, given his in-court denial; and initially denied matters in court to which he had previously stipulated in his affidavit, including that he heard a man yelling as he took the car. The trial court's finding that defendant was not credible, and that APD Koehler's testimony was, was well-supported in the record.

¶ 45 In sum, the evidence was more than sufficient to show that (1) APD Koehler did *not* incorrectly advise defendant that the lack-of-knowledge defense was unavailable to him; (2) her reasons for not wanting to assert this defense at trial were reasonable; and (3) the evidence of defendant's knowledge that a young girl was in the car was such that the lack-of-knowledge defense would have been unlikely to succeed at trial, in any event. We cannot find manifest error on this record.

¶ 46 CONCLUSION

¶ 47 The judgment of the circuit court is affirmed.

¶ 48 Affirmed.