2018 IL App (4th) 150990-U

NO. 4-15-0990

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
December 24, 2018
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Coles County
ANDREW R. MORECRAFT	)	No. 12CF148
Defendant-Appellant.	)	
	)	Honorable
	)	Teresa Kessler Righter,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Harris and Justice Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed concluding defendant's postconviction petition failed to state the gist of a meritorious constitutional claim.

¶ 2 In January 2014, defendant, Andrew R. Morecraft, entered into a fully negotiated guilty plea to first degree murder (720 ILCS 5/9-1(a)(2) (West 2010)). In September 2015, defendant filed a *pro se* postconviction petition, alleging, in relevant part, he would not have pleaded guilty but for plea counsel's erroneous advice defendant had no defense to first degree murder. The trial court dismissed defendant's postconviction petition at the first stage of proceedings as frivolous and patently without merit.

¶ 3 Defendant appeals, arguing the trial court erred in summarily dismissing his petition as his petition set forth the gist of a meritorious claim of ineffective assistance of counsel. We affirm.

¶ 4 I. BACKGROUND

¶ 5 On May 4, 2012, the State charged defendant by information with intentional first degree murder (720 ILCS 5/9-1(a)(1) (West 2010)) (count I) and knowing first degree murder (720 ILCS 5/9-1(a)(2) (West 2010)) (count II). Count II alleged defendant, "without lawful justification, struck [the victim] about the head and body with his fists or another blunt object, knowing said act created a strong probability of death or great bodily harm to [the victim], thereby causing the death of [the victim]."

¶ 6 On January 24, 2014, defendant entered into a fully negotiated guilty plea to knowing first degree murder (count II). He received a 25-year prison sentence to be served consecutively to a sentence in an unrelated case. The trial court ordered defendant to pay restitution to the victim's family. In exchange, the State dismissed count I and a Class 2 felony charge for aggravated driving under the influence (DUI). For the factual basis of the plea, the State asked the court to take judicial notice of a 48-hour affidavit prepared by Lieutenant Jonathan Seiler and the transcript of the preliminary hearing.

¶ 7 The 48-hour affidavit briefly summarized the investigation of the victim's death. Lieutenant Seiler stated the following. On April 23, 2012, officers of the Mattoon Police Department were dispatched to the victim's apartment in response to a possible domestic disturbance in progress. Upon arrival, the officers located the victim inside of his apartment. He had injuries to his face and was unresponsive. The victim was transported to the hospital where he was pronounced dead. Defendant was taken into custody and transported to the police department. At the police department, he told investigators he arrived at the victim's apartment and observed his girlfriend and the victim together. He then stated he and the victim got into a physical altercation, he struck the victim multiple times with his fists, and the victim was

unconscious when he left the apartment. Lieutenant Seiler noted defendant had blood on his hands, blue jeans, and shoes that was not his own.

¶ 8 Lieutenant Seiler testified at the preliminary hearing to his involvement in the investigation of the victim's death. Specifically, he testified to the responding officer's report, an interview with defendant, an interview with the sole witness, Lorilee, an interview with Billy Shewmake, and the results of an autopsy.

¶ 9 Lieutenant Seiler interviewed defendant at the police department after he was taken into custody. Defendant informed Lieutenant Seiler he and his on again/off again girlfriend, Lorilee, went to a campground the day of the victim's death to discuss their relationship. Following the discussion, Lorilee left in a vehicle, leaving defendant behind with no phone or transportation. He walked to a nearby residence (later identified as the residence of Shewmake) and secured a ride into town. Shewmake dropped defendant in the general vicinity of the victim's apartment.

¶ 10 Defendant entered the victim's apartment and discovered the victim sitting in a recliner with Lorilee dancing in front of him. Defendant stated as he approached the victim, the victim stood up and punched defendant one time. Defendant subsequently punched the victim four to six times, knocked him unconscious, and placed him back in the recliner. Defendant then left the apartment, and the victim remained unconscious in the recliner and snoring.

¶ 11 Lieutenant Seiler also interviewed Shewmake. Shewmake stated he was at his residence when defendant knocked on his door and asked to use his phone. Shewmake allowed defendant to use his phone and agreed to give defendant a ride into town. Defendant made several phone calls. Shewmake overheard defendant on the phone say something to the effect of,

" 'I am going to beat your ass, old man.' " Shewmake believed defendant had calmed down since the initial phone conversation and dropped him off in the vicinity of the victim's apartment.

¶ 12 Lieutenant Seiler interviewed Lorilee at the police department on the night of the victim's death. She stated defendant burst into the victim's apartment and immediately went to where the victim was seated. She said the victim never got out of the recliner and never had an opportunity to defend himself or swing a punch. Lorilee witnessed defendant punch the victim four or five times before she fled the apartment in fear.

¶ 13 Patrol officers were dispatched to the victim's apartment in response to a domestic situation after the upstairs residents reported hearing a disturbance and yelling. Lorilee ran up to the officers and informed them defendant had battered an individual inside the apartment. Defendant told the officers he discovered his ex-girlfriend in the apartment with the victim and he "beat the piss out of him." The officers gained entry into the apartment and discovered the victim seated in a recliner. He was unconscious and unresponsive, with significant facial injuries. The officers reported a large amount of blood spatter about the room. There was a half-crushed beer can covered with blood, an overturned lamp with blood on the base, and blood on a refrigerator door handle. The officers then took defendant into custody and transported him to the police department.

¶ 14 Lieutenant Seiler attended the victim's autopsy. The preliminary findings of the autopsy indicated the cause of death was blood aspiration due to blunt force trauma as a result of an assault. The autopsy also revealed the victim suffered multiple facial fractures, abrasions, contusions, and lacerations.

¶ 15 The trial court found a sufficient factual basis, accepted defendant's guilty plea, and sentenced him to 25 years' imprisonment.

¶ 16 In April 2014, defendant filed a motion for leave to file a late notice of appeal, which this court granted. Defendant subsequently filed a motion to dismiss his direct appeal because he failed to file a timely post-plea motion. We granted his motion.

¶ 17 In September 2015, defendant filed a *pro se* postconviction petition alleging plea counsel provided ineffective assistance by erroneously advising defendant he had no defense to first degree murder. He alleged his petition and exhibits, along with the factual basis provided by the State, demonstrated he committed involuntary manslaughter, not first degree murder, and he would not have pleaded guilty to murder but for counsel's erroneous advice.

¶ 18 In November 2015, the trial court summarily dismissed defendant's petition as frivolous and patently without merit. In its written order, the court concluded the factual basis contained sufficient facts to reasonably infer the requisite intent. Defendant filed a motion to reconsider, which the trial court denied.

¶ 19 This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 On appeal, defendant contends the trial court erred in summarily dismissing his postconviction petition as his petition set forth the gist of an ineffective assistance of counsel claim based on the allegation plea counsel erroneously advised defendant he had no defense to the first degree murder charge. Defendant asserts he did have a defense to the first degree murder charge as the factual basis provided for the plea shows defendant committed the lesser-included-offense of involuntary manslaughter, not murder. As defendant's assertion is completely contradicted by the record, we affirm the trial court's judgment.

¶ 22 A. The Post-Conviction Hearing Act

¶ 23 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2014)) provides criminal defendants a means by which they may assert their convictions resulted from a substantial denial of their rights under the United States Constitution, the Illinois Constitution, or both. *People v. Guerrero*, 2012 IL 112020, ¶ 14. Proceedings under the Act are commenced by filing a petition in the trial court in which the original proceedings took place. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). The Act provides for three stages of proceedings in cases not involving the death penalty. *Id*. at 10.

¶ 24 The threshold for survival is low at the first stage. *People v. Delton*, 227 Ill. 2d 247, 254 (2008). A defendant need only allege the gist of a constitutional claim, *People v. Porter*, 122 Ill. 2d 64, 74 (1988), and the trial court may summarily dismiss a postconviction petition only if there is "no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 16 . No arguable basis in law or fact exists where the petition is based on an "indisputably meritless legal theory" or a "fanciful factual allegation." *Id*. A legal theory "completely contradicted by the record" is indisputably meritless. *Id*. A fanciful factual allegation is "fantastic or delusional." *Id*. at 17. We review *de novo* the summary dismissal of a postconviction petition. *Id*. at 9.

¶ 25 B. Ineffective Assistance of Counsel

¶ 26 A challenge to a guilty plea alleging ineffective assistance of counsel is subject to the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), *i.e.*, deficiency and prejudice. *Hill v. Lockhart*, 474 U.S. 52, 57 (1985); *People v. Hall*, 217 Ill. 2d 324, 334-35 (2005). To survive first-stage summary dismissal, a petition need only demonstrate (1) it is arguable counsel's performance fell below an objective standard of reasonableness and (2) it is arguable defendant was prejudiced by counsel's deficient performance. *Hodges*, 234 Ill. 2d at 17.

¶ 27 In the context of a guilty plea, counsel's performance is deficient if counsel failed to ensure the defendant's guilty plea was entered voluntarily and intelligently. *Hall*, 217 Ill. 2d at 335. To establish prejudice in this context, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59. When the ineffective assistance claim relates to a defendant's defense strategy, the petition must articulate a plausible defense that could have been raised at trial. *Hall*, 217 Ill. 2d at 335-36. If a defendant fails to show he was arguably prejudiced, we may dispose of the ineffective assistance claim on this prong alone. See *People v. Buss*, 187 Ill. 2d 144, 213 (1999).

¶ 28 Defendant argues his petition set forth the gist of an ineffective assistance of counsel claim because (1) it is arguable counsel's performance in advising defendant he had no defense was objectively unreasonable and (2) it is arguable defendant was prejudiced by counsel's deficient performance as he had a plausible defense to first degree murder. Specifically, defendant alleges he acted recklessly, not knowingly, and was therefore guilty of only involuntary manslaughter.

¶ 29 *1. Prejudice*

¶ 30 Defendant contends his petition satisfied the prejudice prong because it is arguable his petition articulated a plausible defense that could have been raised at trial, *i.e.*, he committed involuntary manslaughter, not murder. However, this legal theory is indisputably meritless as it is completely contradicted by the record.

¶ 31 The key distinction between first degree murder and involuntary manslaughter is the mental state that accompanies the conduct resulting in the victim's death. *People v. DiVincenzo*, 183 Ill. 2d 239, 249 (1988). The mental state for involuntary manslaughter is

recklessness, while the mental state for first degree murder is knowledge. See 720 ILCS 5/9-1(a)(2), 9-3(a) (West 2010). "A person is reckless or acts recklessly when that person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow." 720 ILCS 5/4-6 (West 2010). A person acts with "knowledge" when that person is consciously aware his or her conduct is practically certain to cause a particular result. 720 ILCS 5/4-5(b) (West 2010). Reckless conduct involves a lesser degree of risk than conduct that creates a strong probability of death or great bodily harm. *DiVincenzo*, 183 Ill. 2d at 250.

¶ 32 Although death is not ordinarily contemplated as a natural consequence of blows from bare fists, see, *e.g.*, *People v. Nibbe*, 2016 IL App (4th) 140363, ¶ 27, whether a defendant used bare fists or a weapon is only one of several nondispositive factors suggesting whether a defendant acted recklessly. *DiVincenzo*, 183 Ill. 2d at 250-51 (1998). Two additional factors include (1) "the disparity in size and strength between the defendant and the victim" and (2) "the brutality and duration of the beating, and the severity of the victim's injuries." *Id*. at 251. Also, "the nature of the killing, shown by either multiple wounds or the victim's defenselessness," may demonstrate a defendant did not act recklessly. *Id*.

¶ 33 Defendant's allegation he did not know his conduct created a strong probability of death or great bodily harm is without merit. Although he expressed surprise upon learning of the victim's death, the record contains direct evidence he was consciously aware his conduct was practically certain to cause death or great bodily harm. The factual basis given by the State revealed defendant told the victim shortly before bursting into his apartment, "I am going to beat your ass, old man." When police arrived, defendant told one of the responding officers he "beat the piss out of [the victim]." Any allegation defendant lacked knowledge his conduct created a

strong probability of death or great bodily harm is contradicted by his own contemporaneous statements, and therefore has no arguable basis in fact.

¶ 34 Even taking as true defendant's allegation he only punched the victim four to six times, the nature of the killing as shown by the brutality of the beating, the size of defendant, the severity and extent of the victim's injuries, and the victim's defenselessness, refutes any assertion he acted recklessly. See, *e.g.*, *People v. Daniels*, 301 Ill. App. 3d 87, 96 (1998) (listing cases that have held severe and vicious beatings of helpless victims cannot be described by any rational jury as involuntary manslaughter). Defendant was 34 years old, six feet tall, and weighed 350 pounds at the time of his arrest. The record does not indicate the age, height, or weight of the victim, but defendant and Lorilee both described the victim as an old man. As for the victim's injuries, the preliminary findings of the autopsy revealed multiple facial fractures, abrasions, contusions, lacerations, and extensive bloody material that the victim aspirated.

¶ 35 The crime scene was equally gruesome. The victim was discovered in a recliner, unconscious, and unresponsive. The lone witness saw defendant jump on the victim before he could react. When she returned after the beating, she saw the victim unconscious with "blood gushin' out of his face," and described his face as "bashed in" and "just mangled." The responding officers reported a large amount of blood spatter about the room. There was a half-crushed beer can covered with blood, an overturned lamp with blood on the base, and blood on a refrigerator door handle. Notably, when defendant arrived at the police department, he had blood on both hands, a large amount of blood on a steel-toed boot, and blood on his jeans, which he indicated was not his own. See *People v. Castillo*, 2012 IL App (1st) 110668, ¶ 57 (stating the fact there was so much blood on the defendant's legs and shoelaces he had to wash his legs and discard his shoelaces added to the circumstances showing the severity of the beating and injuries

and helped to show the defendant knew his acts created a strong probability of death or great bodily harm). Thus, the nature of the killing demonstrates defendant did not act recklessly. See *DiVincenzo*, 183 Ill. 2d at 251.

¶ 36 In support of his argument, defendant cites *People v. Lengyel*, 2015 IL App (1st) 131022. There, the defendant and his father got into a physical altercation, and the father died two days later from a stroke. *Id*. ¶ 6. The State charged the defendant with intentional and knowing first degree murder, and a jury found the defendant guilty of second degree murder. *Id*. ¶¶ 13, 30. On appeal, the defendant argued he did not knowingly kill his father due to the fight's brevity, his limited number of punches (four or five), and the cause of his father's death being attributed to a stroke and not directly to the defendant's punches. *Id*. ¶ 50. The appellate court concluded the evidence was insufficient to establish beyond a reasonable doubt the defendant knowingly killed his father. *Id*. ¶ 55. Rather, the court concluded the defendant acted recklessly by disregarding the risk his punches could lead to a spike in blood pressure, which eventually led to a stroke. *Id*. ¶ 64. The court reduced the defendant's conviction to involuntary manslaughter. *Id*. ¶ 69.

¶ 37 The facts of *Lengyel* are clearly distinguishable from the present case. Unlike the victim in *Lengyel* who was "conscious, coherent, and ambulatory" after the fight and had enough strength to break open a locked door, (*Id.* ¶ 53), the victim here remained unconscious and unresponsive. The victim in *Lengyel* died two days later from a stroke, *id*. ¶ 6, while the victim here died within hours of the brutal beating. Nowhere does the record indicate the victim here ever regained consciousness. The defendant in *Lengyel* stopped punching when he saw blood and called an ambulance soon after. *Id*. ¶ 64. Here, defendant beat the victim severely enough to leave a large amount of blood spatter about the room, blood on a half-crushed beer can and the

base of a lamp, and blood on defendant's hands, a steel-toed boot, and his pants. Instead of calling an ambulance after the beating, defendant left the victim in the recliner covered in blood, unconscious, and "snoring," proceeded to boast to the responding officer that he "beat the piss out of [the victim]," and warned the lone eyewitness she was next.

¶ 38 We find defendant's postconviction petition failed to state the gist of an arguably meritorious claim of ineffective assistance of counsel as it was based on an indisputably meritless legal theory.

¶ 39 *2. Deficiency*

¶ 40 Because we find it is not arguable defendant was prejudiced by counsel's performance, we need not address whether it is arguable counsel's performance was deficient. See *Buss*, 187 Ill. 2d at 213 ("If a reviewing court finds that the defendant did not suffer prejudice, it need not decide whether counsel's performance was constitutionally deficient.").

¶ 41 III. CONCLUSION

¶ 42 We affirm the trial court's judgment.

¶ 43 Affirmed.