2018 IL App (4th) 170625-U

NO. 4-17-0625

FILED
January 22, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re S.A., a Minor	)	Appeal from
	)	Circuit Court of
	)	McLean County
(The People of the State of Illinois,	)	No. 17D102
Petitioner-Appellee,	)	
v.	)	Honorable
S.A.,	)	Brian J. Goldrick,
Respondent-Appellant).	)	Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Presiding Justice Harris and Justice Turner concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, finding (1) respondent did not receive ineffective assistance of counsel and (2) the firearm owner's identification card statute does not violate the proportionate penalties clause of the Illinois Constitution.

¶ 2 In June 2017, the trial court adjudicated respondent, S.A., born in 2000, a delinquent after finding him guilty of the offenses of unlawful possession of a handgun under 18, unlawful possession of a handgun under 21, as a previously adjudicated delinquent, and possession of a firearm without a valid firearm owner's identification (FOID) card. At the August 2017 dispositional hearing, the court sentenced respondent to 24 months' probation.

¶ 3 On appeal, respondent argues (1) he was denied the effective assistance of counsel and (2) the FOID card statute for adjudicated delinquents violates the proportionate penalties clause of the Illinois Constitution. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In May 2017, the State filed a petition for adjudication of wardship alleging, in paragraph 3(A) to (F) respondent was a delinquent minor pursuant to section 5-520 of the Juvenile Court Act of 1987 (Juvenile Court Act) (705 ILCS 405/5-520 (West 2016)).[1] The petition alleged respondent committed the offenses of possession of a stolen firearm (paragraph A) (720 ILCS 5/24-3.8(a) (West 2016)); ineligible for a FOID card (paragraph B) (430 ILCS 65/2(a)(1) (West 2016)); reckless discharge of a firearm in the close vicinity of a business (paragraph C) (720 ILCS 5/24-1.5(a) (West 2016)); reckless discharge of a firearm in the close vicinity of numerous residences (paragraph D) (720 ILCS 5/24-1.5(a) (West 2016)); unlawful possession of a handgun, under 18 (paragraph E) (720 ILCS 5/24-3.1(a)(1) (West 2016)); and unlawful possession of a handgun, under 21 as an adjudged delinquent (paragraph F) (720 ILCS 5/24-3.1(a)(2) (West 2016)).

¶ 6 In paragraph A, the State alleged respondent committed the offense of possession of a stolen firearm in that he knowingly possessed a firearm with knowledge that it had been stolen and without being entitled to possess the firearm. In paragraph B, the State alleged respondent violated the Firearm Owners Identification Act (Act) when respondent was in possession of a firearm without having a valid FOID card or was ineligible for a FOID card. The State alleged respondent committed the offense of reckless discharge of a firearm when he, or someone for whose conduct he is legally responsible, endangered the bodily safety of another in that, while acting in a reckless manner, he discharged a firearm in the close vicinity of businesses (paragraph C) and numerous residences (paragraph D). The State also alleged respondent committed the offense of unlawful possession of handgun when he knowingly had in his

[1] In this case, the charges are laid out in "paragraphs" in a petition for adjudication of wardship instead of "counts" in a criminal complaint.

possession a handgun: while under the age of 18 (paragraph E) and while under the age of 21 as an adjudged delinquent (paragraph F).

¶ 7 D.K. testified she was 17 years old. On April 7, 2017, she, along with her friend Yetana, picked up her friend Sophia, who asked that D.K. also pick up "Exodus," "Steve," "D-Baby," and N.B. and give them a ride for gas money. D.K. then picked up S.A. and stopped at Pop's Grocery, where Steve exited the vehicle and walked to the Red & Blue Food Mart. Steve returned, and King drove to the nearby MetroPCS parking lot. Five individuals, including "Stevie, S.A., N.B., Exodus and D-Baby," exited the vehicle. D.K. observed Scotty drop a bullet and a gun and N.B. pick them up. Everyone reentered the vehicle, and King drove to the food mart's parking lot. Several individuals exited, leaving D.K., Yetana, D-Baby, Exodus, and Sophia in the vehicle. Steve and S.A. "got in another car," and N.B. walked toward the food mart. D.K. left and dropped off Exodus, D-Baby, and Sophia.

¶ 8 On cross-examination, D.K. testified she did not give a statement to officers on April 7, 2017. Instead, she gave a statement to an officer when she was pulled over on April 26, 2017. D.K. stated she received a warning, which she agreed gave her a break because she faced thousands of dollars in fees for not having a valid license or insurance. D.K. later met with Detective Dick in Peoria, and the interview was audio-recorded.

¶ 9 On re-cross-examination, defense counsel moved to admit, as substantive evidence and for impeachment purposes, recordings involving D.K., including a recording made at the traffic stop and her interview with Detective Dick, based on inconsistencies in her testimony. The State objected, arguing D.K. indicated she did not recall certain things and had not testified inconsistently. The trial court found the statements were not inconsistent and did not admit them as substantive evidence.

¶ 10 Following the June 2017 bench trial, the trial court found respondent guilty on paragraphs B, E, and F and adjudicated him a delinquent minor. In August 2017, the court determined paragraphs E and F merged into paragraph B and sentenced respondent to 24 months' probation. This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 A. Ineffective Assistance of Counsel

¶ 13 Respondent argues he was denied effective assistance of counsel due to his attorney failing to present prior statements of witness D.K. as impeachment or substantive evidence. We disagree.

¶ 14 A defendant's claim of ineffective assistance of counsel is analyzed under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Henderson*, 2013 IL 114040, ¶ 11, 989 N.E.2d 192. To prevail on such a claim, "a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Petrenko*, 237 Ill. 2d 490, 496, 931 N.E.2d 1198, 1203 (2010). To establish deficient performance, the defendant must show his attorney's performance fell below an objective standard of reasonableness. *People v. Evans*, 209 Ill. 2d 194, 219, 808 N.E.2d 939, 953 (2004) (citing *Strickland*, 466 U.S. at 687). "Effective assistance of counsel refers to competent, not perfect representation." *People v. Stewart*, 104 Ill. 2d 463, 491-92, 473 N.E.2d 1227, 1240 (1984)).

¶ 15 To establish the second prong of *Strickland*, "[a] defendant establishes prejudice by showing that, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different." *People v. Houston*, 229 Ill. 2d 1, 4, 890 N.E.2d 424, 426 (2008). A "reasonable probability" has been defined as a probability which

would be sufficient to undermine confidence in the outcome of the trial. *Houston*, 229 Ill. 2d at 4. "A defendant must satisfy both prongs of the *Strickland* test and a failure to satisfy any one of the prongs precludes a finding of ineffectiveness." *People v. Simpson*, 2015 IL 116512, ¶ 35, 25 N.E.3d 601.

¶ 16 "Generally, the decision of whether or not to cross-examine or impeach a witness is a matter of trial strategy, which cannot support a claim of ineffective assistance of counsel." *People v. Franklin*, 167 Ill. 2d 1, 22, 656 N.E.2d 750, 759 (1995).

> "The manner in which to cross-examine a particular witness involves the exercise of professional judgment which is entitled to substantial deference from a reviewing court. Defendant can only prevail on an ineffectiveness claim by showing that counsel's approach to cross-examination was objectively unreasonable. Similarly, *** trial strategy ordinarily encompasses decisions such as what matters to object to and when to object." *People v. Pecoraro*, 175 Ill. 2d 294, 326-27, 677 N.E.2d 875, 891 (1997).

¶ 17 In the case before this court, D.K was the State's primary witness and the only witness who connected respondent to the gun. At trial, defense counsel sought to introduce D.K's previous interviews with Officer Jared Johnson and Detective Matthew Dick, both for classic impeachment and as substantive evidence pursuant to section 115-10.1 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10.1 (West 2016)). Arguing for their admission, defense counsel said:

> "I think on cross-examination I asked her about the inconsistencies she's made between the statements when I asked her: [']Did you

recall making those statements to detectives and leaving out various bits of information[?'] so she has been presented with that information here in court under cross-examination.

As to impeach the witness, to perfect the impeachment, the [c]ourt there has the recordings of the interviews that she made."

¶ 18 While ordinarily defense counsel's intentions may not be clear on direct appeal, here counsel not only made his argument to the trial court but also requested to make an offer of proof when the court denied admission of the taped statements. Although it may now be argued trial counsel did not artfully craft his impeachment questions, each of the areas he sought to introduce, which would have otherwise been admissible, were asked of D.K. on either direct or cross-examination.

¶ 19 Respondent complains defense counsel failed to properly lay the foundation for the use of prior inconsistent statements by D.K which made several areas of impeachment impossible. The statements in question to police by D.K. were about (1) the names of the people in her vehicle on the date in question; (2) misidentification of respondent as "Steve"; (3) whether she observed anyone drop a gun while standing outside her car; (4) where the dropping of the bullet and gun occurred; (5) whether there had been a conversation in the car about someone having a gun; (6) when stopped later by the police, she did not receive a traffic citation and understood, as a result, she was saved several thousand dollars in fines and fees for not having a valid license and no insurance; (7) whether she was offered other money for her cooperation in this case; and (8) whether she was threatened with the issuance of the tickets if she did not follow through by speaking to the detective.

¶ 20 In order to properly address respondent's claims, it is necessary to discuss the testimony in detail. We will address each area of inquiry in the same order set forth above.

¶ 21 During her direct examination, D.K. identified each of the people in her car, including respondent. On cross-examination, D.K. was asked whether she left out any reference to "Tana" being in the car when she first testified on direct examination, and D.K. acknowledged having done so. She first mentioned "Tana," who respondent's counsel identified as Yetana, at the end of the State's direct examination and admitted, on cross-examination by respondent's counsel, leaving her out of the list of people when testifying earlier.

¶ 22 D.K. acknowledged getting the names of respondent and Steve mixed up, but she was able to tell them apart—she knew Steve had "dreads" but respondent did not. On direct examination, she identified respondent from a video and described the portion of the video showing him bending down to pick up a bullet he had just dropped, as well as when he dropped the gun.

¶ 23 Inquiry regarding where the gun was dropped and whether D.K. observed anyone drop a gun needs to be considered in light of the particular circumstances of this case. The two locations at issue are directly across the street from each other. D.K.'s entire time at the scene constituted less than 10 minutes.[2] She was asked to take one of the occupants to Pop's Grocery, which was across the street from the Red & Blue Food Mart. D.K. was then asked to drive respondent and companions to the Red & Blue Food Mart, but since the parking lot was full, she initially pulled into the MetroPCS parking lot directly across the street. During these trips, various people exited and entered the vehicle D.K. was driving. She testified on direct examination to seeing respondent drop a bullet, which was then picked up by N.B., and drop a

[2] When asked to view a security video of this incident (State's exhibit No. 1), the entire time from when D.K. was first parked at Pop's Grocery until she left the scene was approximately 9 minutes and 43 seconds.

gun, which was also picked up by N.B. She further testified on direct examination this incident occurred in the MetroPCS parking lot. On the video, she identified the moment in time when respondent dropped the bullet and the moment when respondent dropped the gun. D.K. was cross-examined about her statement regarding respondent dropping the bullet, which was picked up by N.B., and her attention was directed to the video where, during the first drop, apparently respondent was the only person who bent down. Thus, she was confronted about the inconsistency between her statement of what she observed and the video. On redirect examination, D.K. agreed she had been in error when she said N.B. picked up the bullet and, after viewing the video, she saw it was respondent. She reaffirmed on redirect examination her identification of respondent as the person who dropped the gun. D.K. was also cross-examined about her previous statement to the police, and she acknowledged having first identified the person who dropped the gun as "Steve." D.K. admitted on cross-examination having mistakenly identified the location of where the "first drop" or drop of the bullet occurred when she gave a statement to the detective in Peoria. On redirect examination, she again acknowledged her error and noted viewing the video refreshed her recollection. She also acknowledged, on cross-examination, having told the detective the wrong time of the gun drop.

¶ 24 D.K. admitted on cross-examination there were statements made leading her to believe there was something in her car that should not be there, and there was mention of someone other than respondent being in possession of a gun.

¶ 25 D.K. was asked on direct examination about having been stopped by the police some time later, asked some questions by an officer, and then allowed to leave with a warning instead of a traffic citation. She denied giving the statement to Officer Johnson in return for not receiving a citation. On cross-examination, she admitted the decision of the officer to release her

with a warning saved her thousands of dollars in fines and fees because she could have received tickets for having no valid license and no insurance.

¶ 26 Respondent's counsel asked D.K. on cross-examination whether the officer at the traffic stop mentioned "some other funding available for you possibly," which she denied. On redirect examination, D.K. did not remember Officer Johnson talking to her about being a confidential source, and she denied ever signing up to be a confidential source for the police department or receiving money for giving officers any information. When arguing for the admission of respondent's exhibit No. 1, counsel mischaracterized the conversation about compensation as, "she's also offered additional financial incentives to testify." In fact, as respondent's opening brief notes, the taped conversation included a conversation about how she could receive compensation for information about "anybody moving guns" or if someone asks for a ride and "they go shoot up some shit." The officer suggested she call him about any such information, stating "I have the capability of getting you some money on the side." Officer Johnson also cautioned her about telling anyone about this. This was clearly not an offer of additional compensation to testify in this case, but an effort to enlist her as a confidential informant for other matters. As such, it would have constituted collateral impeachment, and a cross-examiner may not impeach a witness on a collateral matter (*People v. Collins*, 106 Ill. 2d 237, 269, 478 N.E.2d 267, 281 (1985)). Even where the trial court, in its exercise of discretion, allows impeachment on collateral matters, the cross-examiner is bound by the witness's answer; extrinsic evidence may not be introduced. *People v. Kirkman*, 241 Ill. App. 3d 959, 963, 609 N.E.2d 827, 830 (1993).

¶ 27 Although no questions were asked by either counsel directly relating to the issue, respondent's counsel contends references in respondent's exhibit No. 1 by Officer Johnson to

having the tickets available to issue if she does not speak with the detective amounted to a threat. However, respondent's exhibit indicates she had already agreed to speak with the detective before Officer Johnson made the comment about being able to hold onto the ticket.

¶ 28 Respondent wants us to speculate regarding how this may have impacted the witness's testimony. However, we are not willing to engage in that level of speculation, as our standard of review on claims of ineffective assistance of counsel is a "reasonable probability that the result of the proceeding would have been different." *Houston*, 229 Ill. 2d at 4. A review of the tape shows she had already agreed to meet with Detective Dick, even though she was potentially at risk of being issued a ticket. She voluntarily spoke with the detective, and any coercive value the financial incentive had was greatly diminished.

¶ 29 Each of the areas of inquiry of which respondent complains was raised before the trial court. The court was in the best position to assess the credibility of the witness, and we are not to substitute our judgment for the court's on matters involving the weight of the evidence or the credibility of witnesses. See *People v. Jackson*, 232 Ill. 2d 246, 280-81, 903 N.E.2d 388, 406 (2009). Respondent has argued the credibility of D.K. was suspect and trial counsel's failure to fully develop her impeachment deprived him of effective assistance. Through the perfect lens of hindsight, it may be possible to consider alternative ways of laying the groundwork for impeachment; however, respondent misses the point. The trial court heard the testimony and observed the witness as she was questioned about each of these areas. The witness admitted where she had been mistaken, acknowledged the errors in previous statements, and agreed she received a benefit in avoiding traffic citations. Respondent's claimed areas of impeachment were before the court, as imperfect as they may have been.

¶ 30 Respondent seeks to raise numerous inferences about the testimony of the witness, all of which were argued before the trial court. The court stated it found D.K. credible by her demeanor and her statements would have likely carried more weight over inferences the defense sought to draw. The court acknowledged the problems it saw with her testimony, commenting at one point it doubted she was truthful about the length of her knowledge or relationship with respondent. However, the court made its credibility determination and explained its reasons for doing so. Having done so, upon review, we recognize "the trier of fact is not required to disregard inferences which flow normally from the evidence before it, nor need it search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt." *Jackson*, 232 Ill. 2d at 281. Respondent carries the burden in a claim of ineffective assistance of counsel, and the inferences simply do not meet that burden in this case. See *Simpson*, 2015 IL 116512, ¶ 35. Thus, the defense cannot prove prejudice, and respondent did not receive ineffective assistance.

¶ 31 B. Proportionate Penalties

¶ 32 Respondent argued in his brief the penalty for the Class 3 felony of unlawful possession of a firearm under the FOID card statute, based on a minor's ineligibility for a FOID card due to a prior delinquency adjudication (paragraph B), violates the proportionate penalties clause of the Illinois Constitution. Ill. Const. 1970, art. I, § 11. We disagree.

¶ 33 Article I, section 11, of the Illinois Constitution (otherwise referred to as the proportionate penalties clause) provides that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. "A defendant can raise a proportionate penalties challenge on the basis that the penalty for a particular offense is too severe under the 'cruel or

degrading' standard or that the penalty is harsher than the penalty for a different offense that contains identical elements." *People v. Williams*, 2015 IL 117470, ¶ 9, 43 N.E.3d 941 (citing *People v. Sharpe*, 216 Ill. 2d 481, 521, 839 N.E.2d 492, 517 (2005)).

¶ 34 In the first instance, the challenger must establish the penalty would constitute cruel and unusual punishment under the eighth amendment of the United States Constitution (U.S. Const., amend. VIII), which our supreme court and this district have both noted is coextensive with the proportionate penalties clause of our constitution. See *In re Rodney H.*, 223 Ill. 2d 510, 518, 861 N.E.2d 623, 628 (2006); *In re Maurice D.*, 2015 IL App (4th) 130323, ¶ 25, 34 N.E.3d 590.

¶ 35 The second basis for a proportionate penalties attack is handled differently. "[U]nder the identical-elements test, if offenses with identical elements do not have identical penalties, the penalties are unconstitutionally disproportionate and the greater penalty cannot stand." *People v. Dunn*, 365 Ill. App. 3d 292, 294, 849 N.E.2d 148, 150 (2006).

¶ 36 The most serious flaw in respondent's argument lies in the fact our supreme court has determined the proportionate penalties clause and the eighth amendment's cruel and unusual punishment clause do not apply to juvenile proceedings initiated by a petition for adjudication of wardship. *Rodney H.*, 223 Ill. 2d at 520-21; see also *In re Dave L.*, 2017 IL App (1st) 170152, ¶ 36, 80 N.E.3d 694; *In re Deshawn G.*, 2015 IL App (1st) 143316, ¶ 52, 40 N.E.3d 762; *Maurice D.*, 2015 IL App (4th) 130323, ¶ 26; *In re A.P.*, 2014 IL App (1st) 140327, ¶ 13, 14 N.E.3d 689. As noted at oral argument, neither respondent nor the State raised this in their briefs.

¶ 37 Our supreme court has held " 'Section 11 is directed to the legislature in its function of declaring what conduct is criminal and the penalties for the conduct.' " *Rodney H.*,

223 Ill. 2d at 518 (quoting *People v. Taylor*, 102 Ill. 2d 201, 206, 464 N.E.2d 1059, 1062 (1984)). Having found the proportionate penalties clause and the eighth amendment to be coextensive, the court went on to point out how both apply only to the criminal process or "direct actions by the government to inflict punishment." *Rodney H.*, 223 Ill. 2d at 518. The court explained how delinquency proceedings are protective in nature and the overall goal of the Juvenile Court Act is to correct and rehabilitate minors, not punish them. *Rodney H.*, 223 Ill. 2d at 520; see also *In re Destiny P.*, 2017 IL 120796, ¶ 18 (stating the overriding purpose of the Juvenile Court Act is one of rehabilitation). The court reasoned a petition for adjudication of wardship is neither criminal in nature nor a direct action by the State to inflict punishment upon a juvenile, and thus, neither the cruel and unusual punishment clause nor the proportionate penalties clause applies in such cases. *Rodney H.*, 223 Ill. 2d at 520-21, 861 N.E.2d at 630; see also *Deshawn G.*, 2015 IL App (1st) 143316, ¶ 52, (stating "neither the eighth amendment nor the proportionate penalties clause apply to juvenile proceedings initiated by a petition for adjudication of wardship because 'a juvenile adjudication of wardship was not criminal in nature and did not impose "punishment" within the meaning of the eighth amendment and proportionate penalties clause' " (quoting *In re Isaiah D.*, 2015 IL App (1st) 143507, ¶ 52, 35 N.E.3d 88).

¶ 38 Here, the proceedings were initiated by the State's filing of a petition for adjudication of wardship alleging respondent committed various gun-related offenses. He was tried in the juvenile court and adjudicated a delinquent rather than convicted of a criminal offense. Based on the supreme court's precedent in *Rodney H.*, we find the proportionate penalties clause does not apply to respondent's juvenile adjudication. This conclusion is consistent with the holdings of *Dave L.*, *Deshawn G.*, *Maurice D.*, and *AP*.

¶ 39 III. CONCLUSION

¶ 40 For the reasons stated, we affirm the trial court's judgment.

¶ 41 Affirmed.